THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

LOUIS M. LOEB, *President* — PAUL B. DE WITT, *Executive Secretary* — ROGER BRYANT HUNTING, *Secretary*

THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 12 — OCTOBER 1957 — *Number* 7

Association Activities

THE SPECIAL COMMITTEE on Antitrust Laws and Foreign Trade, Breck P. McAllister, Chairman, published in June recommendations to bring federal antitrust laws up-to-date in so far as they are applied to trade and commerce with foreign nations.

The committee found that when these laws have been applied abroad in the past important political questions of the maintenance and friendly relations with foreign nations and of our national security have been mixed in with the enforcement of the antitrust laws. Numerous instances of this mixture and the resentments aroused abroad are reviewed in the report, including the Canadian newsprint investigations in 1947, the more recent Swiss watch case, and protests lodged on numerous occasions by foreign governments against proceedings in our courts. Our own efforts to find *ad hoc* solutions to these and other situations as they developed at different times are also considered, including the Iranian oil problem and the more recent Middle East Emergency Committee.

From this review the committee concluded that:

> "The conclusion we draw from the foregoing review is that antitrust has often affected foreign relations or national security in important instances. The result has been a mixture of legal and political questions. It is im-

portant that this mixture be recognized and a means devised whereby in the future the political questions may be recognized as such, separated from the legal issues under the antitrust laws and dealt with by those charged with power over such matters under our Constitution and laws." (p. 18)

The report then makes a careful study of the important constitutional powers of the President as Commander-in-Chief with respect to national security and in the conduct of foreign affairs as recognized by the Supreme Court in the 1936 decision in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 and other cases.

The Special Committee's report points out that, by contrast, "The Attorney General has no constitutional responsibility over the foreign relations or national security of our country" (p. 21) and that before antitrust proceedings are instituted or carried forward by the prosecuting officers they should be fully reviewed by the agencies of our Government invested with constitutional responsibility and power over our foreign affairs and national security.

In contrasting the domestic and foreign application of our antitrust laws, the report says:

". . . the position of the United States as the foremost world power means that we can no longer regulate our 'commerce with foreign Nations' solely with an antitrust law fashioned for the trade and problems of 1890. As our trade and world trade have outgrown those earlier days so, too, has our position in the world. It no longer follows, if it ever did, that what was good enough at home is good enough when we go abroad." (p. 24)

The specific recommendation of the Special Committee is:

"We recommend that Congress should by legislation vest in the President the power to grant exemption from the antitrust laws to any one or more persons, firms or

corporations, domestic or foreign, engaged or proposing to engage in any activity that may present a question of violation of the antitrust laws as applied to commerce with foreign nations. Exemption should be granted if the President finds and makes public his finding that the grant is in furtherance of the national security or foreign policy of the United States." (p. 25)

The reports concludes that:

". . . It is surely not good foreign relations or good national security or even good antitrust law to continue the present situation in which our statutes regulate without regard to the differences that prevail between the application of these laws at home and abroad and without provision for separate treatment of the political questions that so often arise when we apply these laws abroad. We must find some way to segregate the political issues and take care that they are handled with the skill and dignity befitting a great nation before issues of fact and law are turned over to the law enforcement officers to be put before a court." (p. 29)

Copies of the report may be secured from the office of the Executive Secretary at a charge of $1.25 each or as follows: 5 copies at $5.50; 10 copies at $11.00; 20 copies or more at $1.00 each.

THE TENTH CONFERENCE of the Inter-American Bar Association will be held at Buenos Aires, Argentina, November 14 to 24, 1957. Information as to the conference may be secured from William Roy Vallance, Secretary General, 1129 Vermont Avenue, Washington 5, D.C.

THE COMMITTEE on Aeronautics, Leander I. Shelley, Chairman, had as its guest at the organization meeting of the committee Roger R. Nys, Deputy Secretary General of Sabena Belgian World Airlines. The committee will continue its studies of con-

flicts between public and private interests in air space; the Warsaw Convention; International Civil Aviation Organization; and civil and criminal jurisdiction over persons aboard United States aircraft while in flight.

THE ASSOCIATION-SPONSORED tennis team played seven matches at Wimbledon against the team of the Bar Lawn Tennis Society during the meeting of the American Bar Association in London. The English team won all seven matches. However, the Honorary Secretary of the Society, Lord Dunboyne, graciously commented on this result by saying, "The results do not reflect the closeness of the score in many of the games . . ." Everyone playing in the matches agreed, however, that the occasion was a delightful one, and it is hoped that the Bar Lawn Tennis Society will be able to send a team to this country in the near future.

ATTORNEY GENERAL Louis J. Lefkowitz announced during the summer appointments for the study he is making of methods for expediting the publication of the rules and regulations of the departments and agencies of the state government. Nicholas Atlas and Lester Esterman have been appointed Special Assistant Attorneys General for the project. The Attorney General has also appointed an Advisory Committee of lawyers expert in administrative law. The Association's representative on the Advisory Committee is Francis H. Horan. The study by the Attorney General was authorized by the 1957 legislature.

IN JUNE the Committee on Municipal Affairs, Arthur H. Goldberg, Chairman, made public a report on the need for managerial assistance in the office of the Mayor. The report is published elsewhere in this issue of THE RECORD.

THE NEW YORK STATE Society of Certified Public Accountants has called attention to the publication of a pamphlet, "Do you

close your books on New Year's Eve?" Copies of the pamphlet may be secured from the Society at 677 Fifth Avenue, New York 22.

To the Editor:

In THE RECORD of October 1953, page 321, you published my letter to you concerning Kurt Hahn, who was mentioned by Judge Learned Hand at a meeting of The Association of the Bar in cooperation with the International Commission of Jurists. In that letter I mentioned that the Duke of Edinburgh had been educated under the supervision of Kurt Hahn.

It may interest your readers to know that the British Broadcasting Corporation sought Dr. Kurt Hahn's ideas on education, principally because of the interest of the British public concerning the schooling of Prince Charles, Duke of Cornwall. In this connection, the BBC held a panel discussion (press conference) on August 23, 1957, in which Dr. Hahn participated and was questioned by Malcolm Muggeridge, editor of *Punch*, who has just retired, Walter James, editor of *The Times Educational Supplement*, Charles Curren of the *Evening News* and Francis Williams, editor of *Forward*.

Dr. Hahn, who founded the Gordonstoun School in Scotland after he left Germany, stated that the principle he would adopt for selecting a boy for Gordonstoun was the same as for War Office selection boards: character first, intelligence second, knowledge third. He defined the basic qualities of an English public school man as being taught to argue without quarrelling, to quarrel without suspecting, to suspect without slandering.

One of the questioners brought out that Dr. Hahn in his final reports to parents grades the boys as to their attainments in the following order of importance: public spirit; sense of justice; ability to state facts precisely; ability to follow out what he believes to be the right course in the face of discomfort, hardship, dangers, mockery, boredom, skepticism, impulses of the moment. At the very end is listed the standard reached in studies, as to

which Dr. Hahn stated he does not regard the acquisition of knowledge as of paramount importance. In fact, Dr. Hahn stated that while many enlightened men of the universities regard mental ability as of enormous importance, they are more concerned with what he calls "the guts of endeavor."

Sincerely yours,

OTTO C. SOMMERICH

The Calendar of the Association For October and November

(As of September 26, 1957)

October	1	Dinner Meeting of Special Committee on the Administration of Justice Dinner Meeting of Committee on International Law
October	2	Dinner Meeting of Executive Committee Meeting of Judiciary Committee
October	3	Meeting of Committee on Foreign Law Luncheon Meeting of Special Committee to Study Passport Procedures Dinner Meeting of Committee on Post-Admission Legal Education
October	4	Luncheon Meeting of Special Committee to Study Passport Procedures
October	8	Dinner Meeting of Committee on Federal Legislation Dinner Meeting of Committee on Trade Marks and Unfair Competition Meeting of Committee on Legal Aid Meeting of Section on Wills, Trusts and Estates
October	9	Meeting of Committee on Domestic Relations Court
October	14	Dinner Meeting of Committee on Military Justice
October	15	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
October	16	Meeting of Committee on Admissions Meeting of Committee on Arbitration
October	21	Dinner Meeting of Committee on Medical Jurisprudence
October	22	Dinner Meeting of Committee on Insurance Law Meeting of Art Committee
October	23	Dinner Meeting of Committee on Courts of Superior Jurisdiction

October 24 *Sixteenth Annual Benjamin N. Cardozo Lecture.* "The Legal Profession and American Constitutionalism." Speaker—Dean Jefferson B. Fordham of the University of Pennsylvania Law School, 8:00 P.M. *Buffet Supper, 6:15 P.M.*

October 29 Meeting of Special Committee on Wire-Tapping and Eavesdropping Legislation

November 6 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

November 7 Dinner Meeting of Committee on Family Part of Supreme Court

November 12 Dinner Meeting of Committee on International Law

November 13 Dinner Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Trade Marks and Unfair Competition

November 14 New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee

November 15 New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee

November 19 Dinner Meeting of Committee on Courts of Superior Jurisdiction

November 20 Meeting of Committee on Admissions

Report of the President

1956-1957

I confidently report that I shall not be solely remembered as the President of the Association who recommended an increase in dues. I believe this because I have just finished reading the annual reports of our committees. They report so many memorable and exciting accomplishments that any member who reads the reports will be bound to admit that, even with the increase, he receives more than full membership value.

I shall comment on those reports but first let me discuss what we have tried to do this year to promote more efficient administration of the Association's affairs. The Association has been functioning for 86 years. Its membership has increased and, more important, the Association's activities have increased, particularly in recent years, so rapidly and in so many directions that our administrative machinery has to be overhauled and brought up to date. This the Executive Committee and I have undertaken not because we, any more than most lawyers, like administrative chores, but because we were convinced it should wait no longer.

When I say that our management procedures are rickety and inefficient I am criticizing no one, not my predecessors, certainly not the staff of the Association. I am merely criticizing the tools with which they worked.

Particularly since the administration of Mr. Tweed, Presidents have been very busy and very successful in increasing the scope of Association activities, developing new programs, making the impact of the Association felt in many places, enlisting the support of foundations, and making the House an attractive, enjoyable and busy meeting place. Concentration on these worthy objectives left no time for administrative and management operations to be adequately modernized. My predecessors and the staff improvised as they went along so that methods which were adequate when the

Association was smaller and its activities much narrower were called upon to function in a way and to an extent beyond their capacity. All of this meant duplication, waste and inefficiency. The time has come when we must make it easier for our officers, committees and staff.

One of the steps to this end was to put the housekeeping activities of the Association into expert and experienced hands. Thus, we transferred the management of the physical properties of the Association, the House and the Bar Building to Cross & Brown, who have so successfully managed the Bar Building and many other buildings. They will now be responsible for the cleaning, upkeep, painting, repair and general condition of both buildings. So far the change has worked smoothly and effectively.

But there is more to housekeeping than this. There is catering, budgeting, accounting, purchasing, and there is the very important matter of uniform fair and adequate personnel practices. Late in 1956 we engaged the services of the well known management firm, Cresap, McCormick & Paget, to study and advise us on how we could improve these necessary services. All who have read their report, including the staff, are agreed that it contains many helpful, constructive suggestions. We shall, by the time this report is published, have engaged a competent administrative manager, who will supervise these activities, and if all goes well there should be a noticeable lessening of the burdens on the officers, the committees and the staff.

An important result of this program will be that the Librarian of the Association will, for the first time in many years, be able to turn his attention solely to the management of our very valuable collections. During the year, Sidney Hill retired and his years of devoted service were recognized by providing generous pensions for him and his wife. I want to repeat here what I have stated previously, that we are very fortunate indeed to have in the important position of Librarian Mr. Arthur Charpentier. He and the Library Committee have under way plans for the improvement and ex-

tension of the services of the library, and we hope that we can make the reading room more attractive, comfortable and efficient.

This reminds me that I am sure you will be as pleased as I am with the highly successful redecoration of the rooms on the second floor of the House. This was accomplished under the able direction of the House Committee.

The highlight is the inscription in the Supper Room which will perpetuate one of Tweed's great statements of the new spirit of the Association which was his inspiring achievement. Another feature of the redecoration is the display in the Cromwell Room of some 20 oil paintings and drawings by members. These pictures were selected by Mr. Robert Beverly Hale, Curator of American Painting at The Metropolitan Museum of Art, from among the pictures entered in the annual art show, which was a great success this year, as was the Art Committee's photographic show. This display will be changed from time to time.

Now let me comment on some of the work that our committees have engaged in during the past year. I find myself in the same position as my predecessors, in that space does not permit me to make a complete review of the work of our committees. I commend again the annual reports as printed in the Year Book. They constitute a remarkable compilation of achievement and service.

Because of my labors on The Temporary Commission on the Courts, I was, of course, greatly interested in the Commission's legislative program and greatly disappointed in the failure of the Legislature to enact promptly and by a large majority what most informed citizens of the state believe is a program for the better administration of justice which, if not now adopted, will leave the state for many years to come with the ramshackle judicial system that we now have. All, of course, is not lost and there is a chance that the 1958 Legislature will face up to its responsibilities. This can only be accomplished, I am now convinced, if the general public insists upon it and makes its influence fully

felt. The judiciary, with a few notable exceptions, just will not assume the constructive leadership that should be expected of it. The Bar also hesitates to take a position which would cross the judges. There are exceptions and I am proud that this Association's committees and those of the State Bar Association are outstanding ones. The Tweed Commission proposals have the almost unanimous endorsement of the press and of representative civic groups. Through a series of publications starting with *Bad Housekeeping—The Administration of the New York Courts* published in 1955 through the latest report, *Court Reform and the Citizen—1957,* the Association's Special Committee on the Administration of Justice has done everything it could to support the Commission's proposals. The Association, as have many other civic groups, has worked closely with the Committee for Modern Courts which, under the energetic leadership of Mr. Edwin F. Chinlund, rallied public support for the Commission's program.

In addition to the Commission's proposals for a modern judicial system, the Commission is also hard at work on developing a modern code of practice and procedure. The preliminary drafts are being reviewed carefully by the Association's Committee on Courts of Superior Jurisdiction and by the Committee on Law Reform.

This is an appropriate place for me to note an important development which I believe will in time come to have a very marked effect on the caliber of our judiciary and which represents the culmination of years of effort by my predecessors and Judiciary Committee chairmen. I refer to the policy adopted and publicly proclaimed by Mr. Carmine DeSapio, the Democratic political leader, and followed by Mr. Thomas Curran, the Chairman of the Republican County Committee, that each will submit to the Association in advance of the nominating conventions or judicial primaries, the names of candidates being considered for nomination for judicial office. In the past, although our Judiciary Committee has passed on party nominees after the fact of their nomination,

the Committee has had no influence on the nominating process itself. Under the new system worked out by Mr. Tweed in behalf of The Temporary Commission on the Courts with Mr. DeSapio and Mr. Curran, this Association will have a chance to advise the political leaders as to the qualification of those who aspire to nomination for judicial office. This should make it possible for the leaders to select candidates known in advance to be deemed qualified. It will also encourage, I believe, qualified lawyers to come forward as candidates because they will know that their qualifications, and their qualifications alone, will commend them to the Association and, through the Association, to the leaders. These leaders, we feel sure, will avoid naming those deemed not qualified. This, I am confident, will prove an important step forward in implementing one of the ideals of the Association throughout its 86 years. I congratulate Mr. DeSapio and Mr. Curran on their decision to follow this procedure, and I pledge to each that this Association will give an objective, non-political judgment.

I am also pleased that I can report that both the Mayor and the Governor have consistently followed the practice of submitting to the Association in advance the names of those lawyers whom they were contemplating appointing to the bench as has the Attorney General with regard to Federal judicial appointments.

While I am commenting on matters concerning the judiciary, I should like to urge again what the Association urged by way of formal resolution at the Annual Meeting, that Presiding Justice David W. Peck will heed the call of a practically unanimous Bar that he continue his career in the post where he has given such preeminent public service.

Mention was made in the annual report of the President last year of the Association's joint effort with the National Legal Aid Association to improve the administration of criminal justice by making a thorough study of public defender systems throughout the country. The field work and the final drafting of the report have been completed, and

we look forward to publication of the report in the early fall. The distinguished Committee and able staff that have prepared this report are confident that it will point the way for communities, both large and small, to make more effective the obligation to secure adequate representation for indigent criminal defendants. As previously reported, this study was made possible by a grant from The Fund for the Republic.

This spring saw the completion of another valuable study by an equally distinguished Committee financed by the Merrill Foundation for Advancement of Financial Knowledge, Inc. I refer to the publication in June of *National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations.* This preliminary report of the Association's Special Committee to Study Antitrust Laws and Foreign Trade was widely distributed to interested Committees of the Congress, government agencies and specialists in antitrust law. As the Committee states in the foreword to the report, it "deals only with the problems created when important questions of the national security or foreign policy of our country arise in connection with any effort to apply our American antitrust laws to commerce with foreign nations." The preliminary report is only part of a much larger project assigned to the Special Committee, the research for which has been directed by Professor Kingman Brewster, Jr. of the Harvard Law School. Professor Brewster's study will be published as a book which will analyze the law, its impact on different kinds of business arrangements, and various proposals for improving policy, law and administration in this field.

Two other important and long range studies are under way under the supervision of Committees of the Association. One is a study of passport procedures, being made under a grant from the Fund for the Republic. Again the Association's Special Committee is made up of members with expert knowledge in this field, and the Committee has been fortunate to secure Professor Robert B. McKay and Professor

Cecil J. Olmstead of the New York University Law School as Directors of its research. During the summer the staff and the Committee have interviewed in Washington and in New York government officials and others concerned with passport procedures. The reception of the Committee by all interested parties has been extremely cordial, and I feel confident that the Association will make a real contribution in this confused area which is so important to the rights of many of our citizens.

As this report is being prepared, the Association has received word from the Sloan Foundation that it has made a grant for the purpose of enabling the Association to make a study of the causes of congestion in the courts, with a principal emphasis upon the origin of the types of litigation that are responsible for the present congestion and delay. Matching funds will be secured from a second foundation, so that the study should be of sufficient scope to develop answers to problems which students of the present situation believe are at least as important as administrative improvements. In other words, we hope the study will be an entirely "new look" at a problem which has resulted in as much talk as the weather, and with just about the same effectiveness.

Just a year ago the Association released its widely acclaimed report on the federal loyalty-security program. Now the Federal Commission on Government Security has published its report. Naturally this invited newspaper editors, government officials, law teachers and others to compare the two reports. I think it is a fair statement that most informed students of the subject feel that the Association's report and recommendations would furnish not only a more adequate security program than the rather enlarged program recommended by the Federal Commission, but would also provide additional safeguards to personal liberty.

In another important area of governmental activity the Association's Committee on Administrative Law has made contributions that have been commended by the agencies involved. The Securities & Exchange Commission has under review Rule 133 of the Securities Act of 1933. The Commis-

sion proposed the repeal of a longstanding interpretation making registration requirements of the Act inapplicable to securities issued in statutory mergers, reclassifications, etc. The Association's Committee opposed the proposed repeal of the interpretation, and the Chairman appeared at public hearings called by the Commission. At the end of the hearings the Commission made public a reply to the Chairman's proposal and thanked his Committee and asked for continued help on the legislation. The Committee, at the request of Chairman Celler of the Judiciary Committee, approved a proposal to abbreviate records in proceedings for judicial review of administrative orders (H. R. 6682, 84th Congress) and has also advised Chairman Hults of the Temporary State Commission on Coordination of State Activities that it will be interested in reviewing the far-reaching proposals made by that Commission.

Our relations with both the State Legislature and the Congress were, aside from the Temporary Commission's proposals which I have mentioned, satisfactory. At Albany this year we had a new legislative representative, Mr. William J. Cantwell, and, as was to be expected, he found it necessary to spend a good deal of his time on simply learning the ropes which he did, in our opinion, very well indeed. The Association directly sponsored six bills. One of these which permits the Supreme Court to grant counsel fees in cases involving the construction of a will or an inter vivos trust instrument has been enacted into law. Two other bills sponsored by the Committee on Real Property Law passed both houses of the Legislature but were vetoed by the Governor. The remaining three bills, also sponsored by the Committee on Real Property Law, failed to pass the Legislature.

As usual, our hard working Committee on State Legislation turned in an almost perfect performance. Following the schedule of prior years, the Committee's bulletin was mailed each Friday evening, following a Tuesday evening meeting, to each member of the Legislature, the Governor's counsel and his staff and many other public entities in the state.

The bulletins contained a total of 175 reports. Of this number 42 reports were prepared by six other Committees of the Association and approved by the Committee on State Legislation. A feature of the bulletin was a comprehensive 36-page report on the proposals of the Temporary Commission. It is perhaps the best lawyers' detailed analysis of the Commission's proposals available. In addition to the reports and the bulletins, the Committee received more than 400 bills from the office of the Governor's counsel with a request that he be furnished with the Committee's comments within five days. The Committee attempted to place in the hands of the Governor's counsel within the allotted time some response on each measure. In addition there was substantial telephone communication with the counsel's office during the closing days of the 30-day period. The Governor's counsel before the session ended expressed publicly his appreciation for the service rendered to him by the Committee. This service is probably unique not only in the number of reports issued but in their acceptance by the Legislature and by the Governor's counsel as being objective, nonpartisan and reliable.

In connection with federal legislation, various Committees of the Association rendered a similar service to the Congress. The Committee on the Bill of Rights commented on the proposed civil rights legislation. Once again the Committees on International Law and Federal Legislation sent to the Congress a report on the latest version of the Bricker amendment. The Committee said in the report, "We shall analyze the latest Bricker proposal and show that, after all these years, its proponents have not abandoned their basic objective. The time has come to write 'finis' on the Bricker Amendment." This is a sentiment in which I believe most of our members heartily concur.

The Committee on Taxation submitted to the technical staffs of the Congress well considered additional recommendations for the revision of the Internal Revenue Code of 1954. The Committee on International Law sent to the Con-

gress a supplementary report on the constitutionality of G.A.T.T. and O.T.C.

The Committee on Federal Legislation has all but completed reports on the following legislation which undoubtedly will be pressed in the Congress when it reconvenes: Bills for additional judges in the Southern and Eastern Districts, legislation providing that there shall be no federal preemption by implication, and a study of how to deal with the situation that arises when the President is unable to perform the duties of his office. In making the last-mentioned study the Committee was assisted by the Fellow of the Association, Mr. Alan U. Schwartz.

The Committee also has under consideration the various proposals that have been made to resolve the difficult situation that arises when the Chief Judge of a District Court, because of age, is no longer able to discharge effectively his administrative responsibilities. Certainly it is time to change the present method by which Chief Judges are selected on the basis of seniority rather than their aptitude for the important administrative work that must be done if large courts such as those in the Southern and Eastern Districts are to keep abreast of their calendars. Our Committee has not yet decided on the best method for the selection of the Chief Judge, but is convinced that the present method requires improvement.

Because of the more newsworthy aspects of the Association's work in improving the law and the administration of justice and in dealing with governmental agencies, we sometimes overlook the fact that the Association is also an educational institution. I refer not only to the formal educational program of the Committee on Post-Admission Legal Education but to the very large number of lectures, symposia and forums that are sponsored during the year by the various Committees. For example, during the past year the Committee on Arbitration sponsored a symposium which presented leading authorities discussing mediation and arbitration, new uses in arbitration, and arbitration and negligence. Also as

part of the Committee's educational activities there was published during the year a manual on arbitration prepared by the Committee and widely distributed by the American Arbitration Association. The manual has been translated into Japanese.

The Foreign and International Law Committees sponsored a forum on organizing world trade. The Special Committee on Military Justice held a well attended forum which discussed a "New Look at the Court of Military Appeals." The court itself was present at the discussion and held, prior to the forum, a special session of the court for the admission to its Bar of a large number of lawyers sponsored by members of the Committee.

An innovation during the year was a reorganization of the program of the special Committee on Round Table Conferences. The plan evolved by the Committee was to sponsor conferences on rather broad topics of current interest to the profession. The Andrea-Doria disaster, of course, interested lawyers, even those who, like myself, have never been initiated into the mysteries of admiralty law. The conference discussed "special rules of liability in marine disasters." I found it a fascinating evening and the discussion and questions from the floor indicated that the large audience which attended the conference found it equally so.

The work of the Committee on Post-Admission Legal Education this year was distinguished by the excellence of the Section meetings. In the Committee's report will be found listed the galaxy of outstanding authorities who took the time to leave their important official positions or busy practices to bring to our members and the Bar in general recent developments in their specialized fields. Indeed, the Section programs were so attractive that the audiences at the general lectures sponsored by the Committee were smaller. These general lectures, however, were of the highest quality. Speakers were Sir Leslie Knox Munro, Ambassador from New Zealand; Viscount Hailsham, Minister of Education in the present British Cabinet, Mr. Dudley B. Bonsal, who

spoke on the loyalty-security program, and Judge Charles S. Desmond of the Court of Appeals. The Cardozo lecture to be given by Dean Jefferson B. Fordham was postponed from the late spring to the early fall. The Committee has under study the relationship between attendance at the Section meetings and at the general lectures. For my part I favor the continued emphasis on Section meetings. These present solid educational values. I would strictly limit the general lectures to the presentation to the Association of outstanding leaders in the field of jurisprudence.

One meeting, sponsored jointly by the Section on Corporate Law Departments and the Committee on Corporate Law Departments of the Section on Corporation, Banking and Business Law of the American Bar Association deserves special mention. This was in the nature of an institute on corporate law departments and ran for two full days. Subjects discussed included "Advising the Executive on Congressional Investigations and Hearings," "Some Problems in Organization and Operations of Corporate Law Departments," "What the Executive Expects of the Corporate Law Department," "Advising Management," etc. General counsel and officers from many national corporations participated in these sessions and the papers delivered by the highly qualified speakers have been widely published.

An educational venture on the lighter side was organized by the Association's Committee on Labor and Social Security Legislation for the benefit of the members of the American Bar Association who were here for the annual meeting of that Association in July. This effort took the form of a satirical and musical portrayal of a collective bargaining session. The skit was entitled "My Fair Labor" and I am told by those who saw our Committee's presentation and the rival musical by Messrs. Lerner and Lowe that Rex Harrison and Julie Andrews are wasting their talents on an inferior piece of writing.

Mention of our American Bar Association guests prompts me to say that I believe they had a good time while in our

town, thanks to the industrious efforts of the Joint Committee for Entertainment, on which there were representatives of all the local Associations and the New York State Bar Association. I am pleased that The Association of the Bar was able through the devoted efforts of the Association's staff to contribute a great deal to the success of the program of entertainment. The wisdom of our predecessors who built so sturdy a House for the Association was never better appreciated than when 4,500 guests were entertained on a hot Sunday afternoon at cocktails. I arrived early and stayed late, determined that if the building was going to collapse I should shoulder my responsibilities for permitting the House to be used on this occasion. The House did not collapse and I had fun at the party.

Our own entertainment program this year was highlighted by a tribute to the late Judge James Garrett Wallace. The evening was devoted to some of the music and songs with which Judge Wallace delighted us for so many years. It was a fitting tribute and one which I am sure Judge Wallace would have enjoyed. The Committee also sponsored by way of an innovation a one-act opera written by one of our talented members. The Committee's Annual Twelfth Night Festival honored former Police Commissioner Francis W. H. Adams.

An outstanding event of the year was the presentation at the Annual Meeting of an honorary membership in the Association to the Honorable Dag Hammarskjold, Secretary-General of the United Nations. It is not necessary for me to say anything concerning the distinguished career of the Secretary-General. However, I do want to say that the Association is honored by having the Secretary-General as a member and we were delighted with the grace and informality with which he accepted membership.

I am also pleased to report that the Chief Justice of the United States has accepted honorary membership in the Association. Unfortunately, his schedule did not permit him to have the membership conferred on him before the summer

holidays. We look forward to a suitable occasion in the near future to present the membership to this distinguished judge.

This has been a year when there has been much discussion of civil rights, and accordingly the Committee on the Bill of Rights has been most active. The Annual Meeting of the New York State Bar Association adopted an amended Canon 20, dealing with press relations by counsel. This amendment, although not in the exact form proposed by our Committee, substantially met the Committee's recommendation. If the Canon is observed the Committee believes that the constitutional guaranty of trial by an impartial jury will be strengthened.

The sordid misadventures of Mr. "Socks" Lanza opened up the whole complicated subject of wire-tapping and eavesdropping. After extended debate at a Stated Meeting on the recommendations put forward by the Committee on the Bill of Rights and opposed in part by the Committee on Criminal Courts, the meeting directed me to appoint a Special Committee to make a definitive report on this vexing subject at an early Stated Meeting.

The problems of the administration of laws relating to the family also received a good deal of attention during the year. I regret that the effective date of the Youth Court Act sponsored by the Temporary Commission was postponed. Our Committee on the Domestic Relations Court had actively supported this legislation. The experiment of establishing a separate Family Part in the Supreme Court for the First Department was found to be successful, and the Part is now permanently established. I am glad the Association in the initial stages of this experiment was able to assist the Presiding Justice by securing funds from The Doris Duke Foundation to finance a full-time social worker for the Family Part. Indeed, the judges in the Part found the work of the social worker so valuable that the court has now provided for two such workers to be attached to the Part.

Our Special Committee on Improvement of Family Law

has worked closely with the Joint Legislative Committee created by the 1956 Legislature. Although the Joint Legislative Committee has been handicapped by a rather limited grant of authority and by limited funds, our Committee believes that important advances can be made by the Legislative Committee.

The Association also was able to be of assistance to the courts in responding to the request of Presiding Justice Peck for the formation of a panel of lawyers who would be willing to represent indigent persons in appeals. The necessity for the panel was made evident by the decision of the New York Court of Appeals in *People* v. *Kalan*. The panel was organized by our Committee on Legal Aid, and the response to the Committee's appeal for volunteers was most gratifying. The Committee also was successful in persuading the Legal Aid Society to furnish for an experimental period legal aid attorneys at the commitment term at Bellevue.

One new Committee was created during the year, the Committee on Trade Marks and Unfair Competition. I express here my gratification that this Committee, organized late in the year, is already on the way to producing some very important work, particularly in what to me, at least, is the very confusing but interesting field of "neighboring rights."

The Association continues its interest in city affairs through the effective work of the Committee on Municipal Affairs. That Committee in the late spring urged in a well-reasoned report that whereas the City Administrator functions now only as a staff officer, he should be an operating head in the main line of the city's day-to-day operations, with authority and power over the city's great service departments. The report was approved by the press and by civic groups, and also received favorable comments from such papers as the Christian Science Monitor and a number of papers of similar stature in other cities. The Committee is also continuing its study of the levy and collection of city taxes.

The team representing the College of Law of the Univer-

sity of Oklahoma won the national moot court competition this year, and the team of the University of Nebraska College of Law the award for submitting the best brief. Mr. Justice Frankfurter presided over the distinguished bench which judged the finals of the competition. We recognize this competition as one of the most important and rewarding activities of the Association. Students participating from all over the country representing 90 law schools cannot help benefitting from their participation in this unique event. In the long run the Bar reaps an equal benefit from the impetus that the competition gives to the teaching of the arts of advocacy. An almost equally important part of the competition is the social intercourse between students from various parts of the country and the opportunity for the students to meet on a friendly and informal basis leading members of the judiciary and the Bar. I record here, as my predecessors have done, the Association's grateful thanks to the Chairman and members of the Young Lawyers Committee for their hard work, which makes possible the success of the competition.

In one important endeavor during the year the Association was not successful. I refer to our participation as *amicus curiae* in the Matter of *New York County Lawyers' Association* v. *Roel.* I will not here review the facts of the case. They may be found in Matter of *New York County Lawyers' Association* v. *Roel,* in the Supreme Court, 4 Misc. 2d 728 (Sup. N.Y. Co. 1957), affirmed in the Appellate Division, 3 App. Div. 2d 742 (1st Dept.), and affirmed in the Court of Appeals, No. 145, decided July 3, 1957. We did not enter as *amicus* until the case was before the Appellate Division. We were prompted to do this because the language of the order of the lower court was so broad as to raise serious doubts as to whether advice on foreign law, such as has been traditionally given by lawyers not admitted in this state and, whether advice given by lawyers on the law of other jurisdictions in this country, was not prohibited. With a strong and to us, persuasive dissent, the Court of Appeals did not

accept the view put forward in our brief. The majority and dissenting opinions should be read by all our members, because they involve questions of great practical and professional interest. The appropriate Committees of the Association will now consider whether legislation should be proposed to correct what seems to us to be a most unsatisfactory state of the law. The Association will, of course, be kept informed of the recommendations of these Committees.

At the outset of this report I said that I could comment only briefly on the extensive and valuable work done by some Committees, and that space would not permit me even to comment briefly on the work of all of the Committees. Omission of the Executive Committee, Grievance Committee and the several Judiciary Committees, all of whom year in and year out constitute pillars of the finest traditions of this Association's service to the profession, reflects no lack of appreciation of the standard or extent of their performance. I regret that I cannot comment on every Committee's work, knowing as I do of the devoted application by all Committees. Their record, however, is preserved in their reports published in this volume. All who read the reports will find confirmation of the fact so apparent to us all that the Association in this its 86th year continues to adhere to the high ideals set for us by the founders when they first met on Tuesday February 1, 1870 at 8 o'clock P.M. at the Hall in the Studio Building at the southwest corner of 26th Street and Fifth Avenue.

No report could be complete without a word of appreciation for the Executive Secretary. So as not to wax sloppy on the subject of his leadership and helpfulness which I could do very easily, I shall apply to him the bowdlerized version of Lord Bacon's remarks about Court Clerks, once used in a similar way by John W. Davis. They are as follows:

"An ancient Secretary, skillful in precedents, wary in proceedings and understanding in the business of the Association is an excellent finger of an Association and doth many times point the way to the President himself."

I should also like to congratulate this Association for its great good fortune in the selection of its Treasurer, Mr. Worcester. He has demonstrated qualities which are bound to benefit the security of our affairs throughout his tenure of that responsible and difficult office.

During the past year, and particularly while I have been reflecting on the contents of this report, I have tried to find words to express to the members of the Association, its Committees, its officers and its staff my appreciation of their support and my own sense of obligation to the Association. Although it may be presumptuous of me to do so, I should like to adopt as my own the words which Mr. William Evarts used on that March evening so long ago when he accepted election as the first President, and said:

"Gentlemen of the Association of the New York Bar, it is my first duty, as it is my first impulse, to thank you for the great honor you have done me in choosing me to preside over this organization of the Bar. I am sure it is quite in accordance with the practice of our professional intercourse that I should say without affectation to you that I regard it as the chief distinction of my life that you should have thought me worthy of this position."

LOUIS M. LOEB

July 1, 1957

Annual Review of Recent Antitrust Developments

By MILTON HANDLER

I

Last year I had occasion to call attention to the unsettling effect of three decisions involving the legality under the Sherman Act of exclusive selling agreements or distributorships.[1] In one, the Tenth Circuit had reversed a lower court ruling that such an arrangement was unlawful *per se* and had remanded the case for a new trial with a direction that the reasonableness of the restraint be submitted to the jury as an issue of fact.[2] In the second case, Judge Holtzoff had declined to upset a verdict of illegality after having submitted to the jury the question whether the restriction was reasonable.[3] Neither of these courts gave any specific content to the rule of reason to assist the jury in reaching its determination, permitting it to indulge its own notions of reasonableness. In direct conflict with these rulings, Judge Thomsen had upheld the validity of an exclusive distributorship as a matter of law by dismissing a treble damage complaint before trial for legal insufficiency.[4]

At the time, I pointed out that Judge Thomsen's decision alone was faithful to traditional Sherman Act doctrine sanctioning an agreement by a single seller to deal exclusively with one buyer "where the exclusive is not part and parcel of a scheme to

Mr. Handler's review of recent antitrust developments is an annual feature of the Section on Trade Regulation of the Committee on Post-Admission Legal Education.

Grateful acknowledgment is hereby made to the valuable assistance I received in the preparation of this talk from my colleagues Stanley D. Robinson, Joel C. Coleman, Joshua F. Greenberg and Frances Bernstein.

---

[1] Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 368 (1956).

[2] Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F. 2d 721 (10th Cir. 1955).

[3] Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4 (D.D.C. 1955).

[4] Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D.Md. 1956).

monopolize and effective competition exists at both the seller and buyer levels.'"[5]

Naturally, I awaited with great professional interest the outcome of the appeals from the conflicting rulings of the two district judges. And I must confess that my interest did not abate when the attorneys for the plaintiff in Judge Holtzoff's case filed a six page document with the Court of Appeals for the District of Columbia entitled: "Memorandum in Answer to Professor Handler's 'Annual Antitrust Review.'" The essence of their position was that—and I quote—"Professor Handler's gross misapprehensions of the nature of the present jury trial and of Judge Holtzoff's very narrow ground for decision on a motion n.o.v. make the Professor's views worth absolutely nothing."[6] When I read these words, I knew that my closely guarded secret was out.

I believe that you will be interested in the aftermath of the three decisions.

The Fourth Circuit affirmed Judge Thomsen in *Schwing*,[7] adopting his opinion and embracing his lucid analysis.

The District of Columbia Court of Appeals, by a divided court, reversed Judge Holtzoff in *Packard*.[8]

Following the reversal of *Village Theatre*[9] by the Tenth Circuit, there have been two retrails, both resulting in jury disagreements. The next re-run of this marathon is now scheduled for the Fall.

The legal issues raised by the creation of an exclusive dealership are well illustrated by *Packard*. The plaintiff in that case was eliminated as a Packard dealer in Baltimore when a competitor received an exclusive franchise from the manufacturer. Judge Holtzoff sustained a recovery on two theories: (1) that an agreement between the manufacturer and its exclusive distribu-

---

[5] Handler, *supra* note 1, at 370.

[6] Memorandum for Appellee, p. 6, Packard Motor Car Co. v. Webster Motor Car Co., 243 F. 2d 418 (D.C.Cir. 1957).

[7] Schwing Motor Co. v. Hudson Sales Corp., 239 F. 2d 176 (4th Cir. 1956).

[8] Packard Motor Car Co. v. Webster Motor Car Co., 243 F. 2d 418 (D.C.Cir. 1957).

[9] Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721 (10th Cir. 1955).

tor was the equivalent of a conspiracy to monopolize trade in Packard cars; and (2) that such an agreement, as distinguished from a unilateral selection of a single distributor by Packard acting independently, constituted an illicit conspiracy in restraint of trade. The majority of the Court of Appeals, consisting of Judges Edgerton and Prettyman, rejected both of these theories. In so doing they noted their substantial agreement with the reasoning in *Schwing*.

Applying the *Cellophane* doctrine,[10] the court held that "since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly."[11] Hence the exclusive was not invalid under the monopoly exception to the general rule of legality. The court went on to repudiate the notion that the exclusive constituted an unlawful contract or conspiracy in restraint of trade. The fact that it was the exclusive distributor who requested the grant of exclusivity did not convert an otherwise lawful ancillary contract into an illegal vertical conspiracy. Nor did illegality ensue from the elimination of the other Packard dealers in the Baltimore area as an inevitable concomitant of the exclusive. The test is whether there is effective competition in the distribution of other makes of automobiles.

Expressing no opinion on the monopoly claim, Judge Bazelon dissented on the theory that the case had properly been submitted to the jury on the issue of conspiracy under Section 1 of the Sherman Act. According to the dissent, the jury was warranted in finding that the elimination of the plaintiff as a Packard dealer resulted not from Packard's unilateral decision in selecting its customers, but rather from an agreement between Packard and the exclusive distributor to get rid of the latter's competition.[12] At the same time, Judge Bazelon left open the

[10] U.S. v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

[11] Packard Motor Car Co. v. Webster Motor Car Co., 243 F. 2d at 420.

[12] Under this view of the law, the Sherman Act "does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another." *Id.* at 422.

question of whether the statute "applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the maunfacturer's competitive position vis-a-vis more powerful manufacturers."[13] But if the discussion rises to the level of an agreement to eliminate all dealers save the exclusive distributor—the necessary upshot of an exclusive—the dissent would hold the Act transgressed. But as the majority pointedly observed: "Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it."[14] Hence any distinction between discussion and agreement is completely unrealistic.

Although the atmosphere has been appreciably cleared as a result of the concurrence of two circuits on this subject, we are still confronted with a measure of uncertainty stemming from the fact that the Tenth Circuit has declared that the reasonableness of an exclusive distributorship is an issue to be submitted to the jury. As I have stated before, I can see nothing to recommend a rule which permits the legality of this traditional ancillary restraint to depend on the fluctuating and untrammeled judgments of different juries. If there is a genuine issue of fact as to the anticompetitive effects of an exclusive—that is, if there is a real dispute as to whether competing buyers are being denied access to needed supplies—there is room for a jury to perform its normal fact-finding function. Otherwise, the exclusive should be upheld as a matter of law. Perhaps the Tenth Circuit, which relied on Judge Holtzoff's ruling, would have reached a different decision if it had had the benefit of the opinions of the District of Columbia Court of Appeals and of Judge Thomsen and the Fourth Circuit. In any event, since petitions for certiorari are expected to be filed in both *Schwing* and *Packard,* it may be

---

[13] *Id.* at 421 n.1.
[14] *Id.* at 421.

that by this time next year the Supreme Court will have written the final chapter on this topic.

Turning to the related question concerning the validity of territorial restrictions in distributor agreements, we are no more enlightened at this juncture than we were a year ago. Following the example of Philco,[15] the J. P. Seeburg Corporation agreed to a consent decree without litigating the lawfulness of its restrictive agreements.[16] The decree prevents the defendant from limiting the territories within which its distributors may sell, but permits it to specify areas of primary responsibility.[17] The fact remains that to this day there has been no authoritative judicial determination condemning territorial restrictions. Indeed, the law is to the contrary.[18]

II

The front page item of the current term was the Supreme Court's decision in the *duPont-General Motors*[19] case on Monday of this week. More startling than the ruling itself are its possible radiations unless, like some of the Court's other antitrust opinions, this one is "good for a single passage only."

The Court split four-to-two with three justices not participating. Mr. Justice Brennan, who wrote the opinion for the Court, was joined by the Chief Justice and Justices Black and Douglas —the three dissenters in last year's *Cellophane*[20] decision. The minority consisted of Justices Burton and Frankfurter.

---

[15] U.S. v. Philco Corp., 1956 Trade Cases par. 68,409 (E.D.Pa. 1956).

[16] U.S. v. J. P. Seeburg Corp., 1957 Trade Cases par. 68,613 (N.D.Ill. 1957).

[17] ". . . Seeburg may exercise its right to choose and select its distributors and customers, to designate geographical areas in which such distributors shall respectively be primarily responsible for distributing coin operated phonographs, to terminate the franchises of such distributors who do not adequately represent Seeburg and promote the sale of all coin operated phonographs manufactured by Seeburg in areas so designated as their primary responsibility, and such designation of suggested geographical areas, standing alone, shall not be considered a violation. . . ." *Id.* at p. 72,479.

[18] Handler, *supra* note 1, at 378.

[19] U.S. v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

[20] U.S. v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

The situation may not be unlike that which existed in the *Steel*[21] case where the Court divided four-to-three. Justice Holmes wrote in a letter to Harold Laski:

> "I deeply regretted the situation of the Steel Trust Case—decided 4 to 3—without a majority of the whole court and with the probability that if the whole court could sit it would have gone the other way."[22]

Although the Government had initially charged the defendants with a broad conspiracy in violation of Sections 1 and 2 of the Sherman Act and had assailed duPont's acquisition of 23% of General Motors stock in 1917 and 1919 under both the Sherman and Clayton Acts, the Court confines its decision to a holding that the stock ownership contravened Section 7 of the Clayton Act of 1914.

That the Government's Clayton Act contention was merely a makeweight is apparent from the briefs. Only twenty of the seven hundred and fifty pages of the briefs of the Department of Justice, duPont and General Motors were devoted to this issue. As Justice Burton notes in his dissent:

> "In the closing pages of its brief, and for a few minutes in its oral argument, the Government added the assertion that duPont had violated §7 of the Clayton Act in that its stock interest in General Motors 'has been used to channel General Motors' purchases to duPont.'"[23]

A seven-month trial with a transcript of 8,283 pages dealing with a multiplicity of issues, all thoroughly and expertly developed by counsel in testimony and exhibits and carefully appraised by the district judge in an opinion of some 100 pages, now culminates in a determination by a minority of the full

[21] U.S. v. United States Steel Corp., 251 U.S. 417 (1920).

[22] 1 HOLMES-LASKI LETTERS 248–49 (1953), March 4, 1920.

[23] U.S. v. E. I. duPont de Nemours & Co., 353 U.S. at 609 (dissent). See also Address by Robert A. Bicks, First Assistant, Antitrust Division, Antitrust Section of the American Bar Association, July 13, 1957.

Court of what was, at most, merely a peripheral and supplementary claim.

The first question confronting the Court was whether the 1914 version of Section 7 applies to vertical integration. In holding that it does, the Court discards forty years of uniform administrative interpretation by both the Federal Trade Commission and the Department of Justice. It makes no effort to reconcile its present holding with its earlier decision in *International Shoe*,[24] which requires that there be "substantial competition" between the acquired and acquiring companies as a prerequisite to the application of the statute. According to the majority, such competition must exist where the first of the three Section 7 yardsticks is invoked; but it is not necessary where the claim is that the acquisition restrains commerce or tends to create a monopoly.

What is the Court's methodology in determining whether a vertical acquisition offends the statutory prohibitions?

It first endeavors to define the appropriate market:

> "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."[25]

Without any analysis of the facts and without the benefit of any finding of the trial judge, the Court by its own *ipse dixit* defines the market in terms of finishes and fabrics used in the automotive industry, despite clear evidence that these products were not generically different from those used in other industries. The defendants' contention regarding the market is thus summarized:

> "Appellees argue that there exists no basis for a finding of a probable restraint or monopoly within the meaning

[24] International Shoe Co. v. F.T.C., 280 U.S. 291, 298–99 (1930).
[25] U.S. v. E. I. duPont de Nemours & Co., 353 U.S. at 593.

of §7 because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses. It is stated in the General Motors brief that in 1947 duPont's finish sales to General Motors constituted 3.5% of all sales of finishes to industrial users, and that its fabrics sales to General Motors comprised 1.6% of the total market for the type of fabric used by the automobile industry."[26]

This is followed by the Court's dogmatic conclusion:

"The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act. Cf. *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics."[27]

Having thus delineated the market, the Court then lays down two substantive requirements:

"The market affected must be substantial. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357. Moreover, in order to establish a violation of §7 the Government must prove a likelihood that competition may be 'foreclosed in a substantial share of . . . [that market].' Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General

[26] *Ibid.*
[27] *Id.* at 593–95.

Motors' share of that market is fully established in the evidence."[28]

These passages represent the Court's entire discussion of the substantive meaning of Section 7 in relation to vertical acquisitions. The reference to foreclosure is a direct quotation from *Standard Stations*.[29]

The conclusion of illegality is not rested on any affirmative showing that the stock purchase had any adverse effect on the competitors of either duPont or General Motors. Rather, it is assumed from the mere size and position of General Motors in the automotive industry and the quantum of its finish and fabric purchases from duPont. The reasoning runs as follows: Since General Motors produces almost one-half of the automobiles sold in the industry, it presumably consumes approximately one-half of the total finishes and fabrics used by the automotive industry. And since duPont in 1947 supplied 68% and 38.5% of General Motors' finish and fabric requirements, respectively, duPont has a substantial share of the relevant market.[30] This share, the majority felt, was directly attributable to the acquisition. Although the trier of facts had specifically found to the contrary, the Court thought that: "The inference is overwhelming that duPont's commanding position was promoted by its stock interest and was not gained solely on competitive merit."[31]

The Court measures the legality of duPont's ownership of General Motors stock by the conditions existing at the time suit was brought and not at the time of acquisition. Indeed, there is a veiled suggestion in the opinion that the purchase might not have been unlawful in 1917 or 1919.[32] The Court does not deem

[28] *Id.* at 595.

[29] Standard Oil Co. of California v. U.S., 337 U.S. 293, 314 (1949).

[30] "Because General Motors accounts for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise duPont supplies the largest part of General Motors' requirements, we must conclude that duPont has a substantial share of the relevant market." *Id.* at 596.

[31] *Id.* at 605.

[32] *Id.* at 599.

it unfair to set aside a transaction which occurred more than forty years ago. The purpose of the Clayton Act, it says, was to " 'arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consumation.*' . . . 'Incipiency' in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect." [22] If there is a reasonable probability that the retention of the stock may result in the prohibited anticompetitive consequences, the Government may take action regardless of the passage of time.

Justice Burton takes sharp issue with the majority in its treatment of the law and the facts. Significantly, he was joined in his dissent by Justice Frankfurter, the father of "quantitative substantiality." The opinion opens with this warning note:

> ". . . over 40 years after the enactment of the Clayton Act, it now becomes apparent for the first time that §7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of §7." [24]

The dissent disagrees with the application of Section 7 to vertical integration. It analyzes the wording of the statute, its legislative history, the long course of administrative practice and the various judicial precedents,[25] concluding that the law relates to horizontal combinations only.[26]

Justice Burton finds no warrant in the statutory language, its history or prior construction for the majority's novel view that legality is dependent on the facts existing at the time of suit rather than of acquisition. He emphasizes that Section 7, by its terms, is directed at the unlawful *acquisition* rather than the

[22] *Id.* at 597.
[24] *Id.* at 611.
[25] *E.g.*, International Shoe Co. v. F.T.C., 280 U.S. 291 (1930).
[26] U.S. v. E. I. duPont de Nemours & Co., 353 U.S. at 619.

unlawful *use* of stock. "The result [reached by the majority]," he concludes, "is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness."[37]

Even if the majority were correct in applying Section 7 to vertical integrations and in measuring the anticompetitive effects at the time of suit, the dissenters would still hold that there had been no violation since there was, in their view, no showing of any reasonable probability of foreclosure of competition from a substantial share of the relevant market. To them foreclosure means a significant restriction of access to needed supplies or needed outlets.[38] This can only be determined by a complete market analysis. "A mere showing that a substantial dollar volume of sales is involved cannot suffice."[39] "Section 7 thus requires a case-by-case analysis of the relevant economic factors."[40]

Justice Burton then presents a detailed analysis of the relevant facts found below which were not challenged on the appeal but were ignored by the Court. He points out that while thousands of duPont products could be used by General Motors, it actually obtains only a limited number from duPont, patronizing duPont's competitors for the rest. He criticizes the Court for blinking its eyes to the many articles which General Motors declines to buy from duPont or which it buys only in small quantities. For example, General Motors in 1947 bought only .4% of its adhesives and .2% of its anodes from duPont. The record further discloses independent purchasing patterns by the various

---

[37] *Id.* at 622.

[38] "When a vertical acquisition is involved, its legality thus turns on whether there is a reasonable probability that it will foreclose competition from a substantial share of the market, either by significantly restricting access to needed supplies or by significantly limiting the market for any product. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 122–127. The determination of such probable economic consequences requires study of the markets affected, of the companies involved in relation to those markets, and of the probable immediate and future effects on competition." *Id.* at 625.

[39] *Ibid.*

[40] *Id.* at 626.

divisions of General Motors. Thus, Oldsmobile is the only division buying anti-freeze from duPont, while it is one of the two automobile divisions which does not finish its cars with duPont's "Duco." Buick is the only division that uses duPont's motor enamel. No purchases at all are made by many divisions of various duPont undercoat paints, lacquers and varnishes.

Nor is there anything sinister about the fact that General Motors' purchases of finishes and fabrics represented a preponderant part of duPont's sales of such products to automotive customers. For the record clearly explains why Ford and Chrysler—the other larger automobile companies—were not significant customers of duPont. Ford had chosen to manufacture the major share of its requirements of fabrics and finishes and Chrysler had consistently followed the policy of selecting a single supplier to whom it would be the most important customer.

The minority accepts the finding of the lower court that the acquisition did not, in fact, foreclose duPont's competitors from selling General Motors either finishes or fabrics. There was no agreement of exclusive dealing; there was no agreement to prefer duPont; there was, in fact, no preference or favoritism. Purchases were made solely on their merits. And since the competitive opportunities of duPont's competitors had not been impaired for a period of thirty years, there was no reasonable likelihood of such impairment in the future.

The dissent then turns to the question of the relevant market. For this purpose it is willing to assume the correctness of the Court's conclusion that duPont's competitors have been or will be foreclosed from General Motors' paint and fabric trade. This fact alone is without legal significance unless the "foreclosure involves a substantial share of the relevant market and . . . significantly limits the competitive opportunities of others trading in that market."[41]

The minority's central thesis is that:

> "The Clayton Act is not violated unless the stock acquisition substantially threatens the competitive opportuni-

[41] *Id.* at 648–49.

> ties available to others. . . . The effect on the market for the product, not that on the transactions of the acquired company, is controlling."[42]

Justice Burton finds no basis in the record for the Court's conclusion that automobile finishes and fabrics have sufficiently peculiar characteristics and uses to constitute products distinct from all other finishes and fabrics. He asserts:

> "The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary."[43]

> "We are not told what these 'peculiar characteristics' are. Nothing is said about finishes other than that Duco represented an important contribution to the process of manufacturing automobiles. Nothing is said about fabrics other than that sales to the automobile industry are made by means of bids rather than fixed price schedules. Dulux is included in the 'automobile' market even though it is used on refrigerators and other appliances, but not on automobiles. So are other finishes and fabrics used on diesel locomotives, engines, parts, appliances and other products which General Motors manufactures. Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record."[44]

From his exhaustive review of the evidence, Justice Burton concludes that the automotive finishes and fabrics sold to General Motors by duPont were indistinguishable from like products sold to other nonautomotive industrial users and that General Motors' purchases from duPont were less than 3.5% of the national market for industrial finishes and about 1.6% of the nationwide total for industrial fabrics. In short, the dissent be-

[42] *Id.* at 653.
[43] *Id.* at 650.
[44] *Ibid.*

lieves "that an insubstantial portion of this total market would be affected even if an unlawful preference existed or were probable."[48] Unlike the majority, Justices Burton and Frankfurter refuse to attach any significance to the fact that "duPont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles during the later years covered by the record."[49]

What is the doctrinal significance of the decision?

Does it mean that every acquisition of stock in a customer since 1914 is now vulnerable to attack?

At best, the present decision could apply only to those vertical stock purchases which, at the time of suit, would have the anticompetitive consequences prescribed by the statute. This of itself rules out many of the transactions which have taken place during the past four decades. It is doubtful, however, that the Court intended to lay down a rule of universal application or that it is inviting the Department of Justice and the Federal Trade Commission to measure the probable anticompetitive effect of every post-1914 transaction by the conditions prevailing today. After a reading of the Government's brief and the majority opinion, one cannot escape the conclusion that both the facts and the law were tailored to meet the special circumstances of this one case. The inarticulate major premise is that the Clayton Act does not countenance the purchase by the fourth largest industrial concern of a substantial stock interest in the second largest corporation in America. It may well be queried whether the same result would ensue in cases of stock acquisitions involving companies of smaller dimensions.

What about purchases of assets consummated before 1950? Prior to its amendment, Section 7 did not apply to assets. Asset acquisitions are, however, subject to challenge under the Sherman Act. But a vast amount of decisional law would have to be overturned before Sherman Act proceedings could succeed. The last two pronouncements of the Supreme Court under the Sher-

[48] *Id.* at 654.
[49] *Ibid.*

man Act were *International Harvester*[47] and *Columbia Steel*,[48] in both of which the defendants prevailed.

Are horizontal stock acquisitions of early vintage likewise susceptible to attack?

Heretofore the first of the three Clayton Act standards has been treated as though the lessening of competition was to be tested in the entire market and not merely with respect to the competition between the acquired and acquiring companies. So far as stock acquisitions are concerned, the implication from both opinions is that the present Court, unlike the Court that sat in *International Shoe*,[49] is disposed to give the statute its full and literal meaning.

Congress was particularly careful both in 1914 and again in 1950 to exclude from the operation of its anti-merger enactments purchases that had been made before the effective date of the new legislation. The Court, on the contrary, gives retroactive scope to its new interpretations of the 1914 statute, upsetting an open and notorious stock ownership of long duration. Is it not patent that what is not deemed unfair to the industrial giants would be stigmatized as profoundly unjust to smaller business units?

Does the decision adopt quantitative substantiality as the controlling principle under the old and new versions of Section 7? Possibly so. The court quotes from *Standard Stations*[50] and adopts its test of substantial foreclosure of a share of the market. But there are countervailing considerations not to be overlooked. The Clayton Act aspects of the litigation received only passing attention in the briefs. The critical literature on quantitative substantiality is not noted by the Court.[51] The precedents ex-

[47] U.S. v. International Harvester Co., 274 U.S. 693 (1927).

[48] U.S. v. Columbia Steel Co., 334 U.S. 495 (1948).

[49] International Shoe Co. v. F.T.C., 280 U.S. 291 (1930).

[50] Standard Oil Co. of California v. U.S., 337 U.S. 293, 314 (1949).

[51] See, *e.g.*, Adelman, *Economic Analysis and Critique of the Facts Considered in Judging the Legality of Mergers*, 21 CURRENT BUSINESS STUDIES 21, 22 (1954); Carson, *Corporate Mergers*, CCH, HOW TO COMPLY WITH THE ANTITRUST LAWS 279, 285 (1954); Donovan, *Mergers and the Antitrust Laws*, 1 ANTITRUST BULL. 179, 185 (1955); Gwynne, *The Federal Trade Commission and Section 7*, 1 ANTITRUST BULL.

pressly rejecting the doctrine are not considered.[52] The fact that the Department of Justice and the Federal Trade Commission have both rejected this unsound rule is ignored.[53] The Court appears oblivious of the fact that the whole current of professional, administrative and judicial opinion is opposed to the application of this concept to mergers and stock acquisitions.

The Court's opinion does not explicitly reject the Attorney General Committee's gloss on the language of *Standard Stations*.[54] Justice Burton argues that there is foreclosure of competition from a substantial share of the market only when there is a significant restriction of access to needed supplies or a significant limitation of access to needed outlets. Foreclosure has no real meaning when unrelated to market conditions. I do not believe, therefore, that in future cases, when the Court apprehends the dangers to our entire antitrust philosophy resulting from a mechanical adherence to quantitative substantiality, it will sanction the rule in merger litigations. This may be wishful thinking, however, and certainly, no one can shut his eyes to the words and the implications of the majority opinion. If the ruling presages the adoption of quantitative substantiality under

---

523, 529 (1956); Handler, *Quantitative Substantiality and the Celler-Kefauver Act —A Look at the Record*, 7 MERCER L. REV. 279, 289 (1956); Handler, *Monopolies, Mergers and Markets—a New Focus*, TRADE REGULATION SYMPOSIUM 17, 32 (1955); Massel, *The New Section 7*, 1 ANTITRUST BULL. 543, 547 (1956).

[52] U.S. v. Brown Shoe Co., 1956 Trade Cases par. 68,244, p. 71,114 (E.D. Mo. 1956); Transamerica Corp. v. Board of Governors, 206 F. 2d 163, 170 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953); Pillsbury Mills, Inc., FTC Dkt. 6000, CCH TRADE REG. REP. (9th ed.) par. 11,582, p. 12,545 (1953). See also American Crystal Sugar Co. v. Cuban-American Sugar Co., 1957 Trade Cases par. 68,735, pp. 73,010, 73,012 (S.D.N.Y. 1957) (decided three days after *duPont-General Motors*).

[53] See Barnes, *Quantitative Substantiality*, 8 ABA ANTITRUST SECTION REPORT 11 (1956); Address by Attorney General Brownell, National Industrial Conference Board, November 17, 1955; Address by Assistant Attorney General Barnes, Judicial Conference, Third Circuit, July 6, 1955; Address by Assistant Attorney General Barnes, Northwestern University Law School, May 10, 1955; Address by Attorney General Brownell, New York Chapter of the Public Relations Society of America, September 30, 1954; FTC REPORT ON CORPORATE MERGERS AND ACQUISITIONS 162, 180–85 (1955); *cf.* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955); Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 381 (1956).

[54] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 141–44 (1955).

amended Section 7 in cases not involving the largest industrial corporations of America, then the precedent will have a sweeping impact.

The relationship of the present decision to *Cellophane* presents an interesting exercise in the reconciliation of judicial precedents. Three of the four members of the majority were the dissenters in *Cellophane*. Their hostility to last year's ruling has apparently not abated. But, nowhere in their opinion do they cast any doubt on the validity of *Cellophane* as a binding authority. The case is not even cited. The delineation of the market is predicated upon an assumed state of facts. The Court assumes that automobile finishes and fabrics have sufficiently peculiar characteristics and uses to warrant their being differentiated from all other finishes and fabrics. To be sure, as the dissent emphasizes, this conclusion is completely unsupported by the record. But on the factual assumption made, automobile finishes and fabrics would by hypothesis constitute a separate market within the *Cellophane* doctrine. If the finishes and fabrics used on automobiles in fact possess "sufficiently peculiar characteristics and uses" differentiating them from all other finishes and fabrics used in industry, by definition the two types are not reasonably interchangeable for the same end use.

It is highly hazardous to essay the role of a prophet in gauging the doctrinal import of any new case, particularly one as dramatic as this which only saw the light of day some 72 hours ago. Unanimous opinions prevail by the strength of their authority; an opinion by a minority of the Court must rely upon its inherent fairness and logic. The dissent is faithful to the record. It makes no blithe assumptions for which there is no evidentiary support. It faces up to all the difficulties which the case presents. It does not evade the relevant legislative, administrative and judicial materials. Even accepting the majority's major premises, it finds that the undisputed facts of the record compel a different result.

Is it not, therefore, probable that in other litigations involving other parties, this ruling of the four Justices will be treated as a *sui generis* precedent to be limited to its peculiar facts? Cannot

the decision be interpreted to mean this only—it is wrongful for one of America's largest companies to hold stock in a customer, described by the majority as "the colossus of the giant automobile industry"?[55] Is not the dissent likely to win ultimate acceptance in the free market place of ideas?

III

Ever since *Fashion Originators' Guild*[56] upheld a refusal to consider evidence in justification of a group boycott, it has commonly been supposed that concerted refusals to deal are among those restraints which are illegal *per se* under the Sherman Act. The sweeping dicta of the Supreme Court in *Kiefer-Stewart*,[57] *Columbia Steel*,[58] and *Times-Picayune*[59] have served to reinforce this view. More recently, however, several lower federal courts have cast doubt on whether the doctrine is truly a rule of invariable prohibition.[60] These courts would exercise a discriminating judgment between those boycotts which are so patently injurious to competition as to admit of no legal justification, and those having less obvious anticompetitive repercussions so as to warrant application of the rule of reason in determining their legality.

Probably the most thoughtful and comprehensive judicial synthesis of the decisional law on this subject is contained in Judge McNamee's opinion in *U.S.* v. *Insurance Board of Cleveland*.[61] In that case, both sides having moved for summary judgment, the District Court was called upon to adjudicate the validity of certain exclusionary rules promulgated by an association of insurance agents which dominated the local market. The

[55] U.S. v. E. I. duPont de Nemours & Co., 353 U.S. at 595.
[56] Fashion Originators' Guild v. F.T.C., 312 U.S. 457, 467–68 (1941).
[57] Kiefer-Stewart v. Seagram, 340 U.S. 211, 214 (1951).
[58] U.S. v. Columbia Steel Co., 334 U.S. 495, 522 (1948).
[59] Times-Picayune Pub. Co. v. U.S., 345 U.S. 594, 625 (1953).
[60] U.S. v. Insurance Board of Cleveland, 144 F. Supp. 684 (N.D.Ohio 1956); Union Circulation Co. v. F.T.C., 241 F. 2d 652 (2d Cir. 1957); Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 300 (S.D.N.Y. 1954), *aff'd*, 225 F. 2d 289 (1955).
[61] 144 F. Supp. 684 (N.D.Ohio 1956).

Government argued that the challenged rules constituted an agreement to boycott and as such were unlawful *per se*. The defendant association admitted the boycott but contended that its conduct was sheltered by the rule of reason. After reviewing the leading Supreme Court decisions in which group boycotts had been condemned, Judge McNamee concluded "that in all of them the vice of illegality was inherent in the unlawful objectives of the combination and in the means employed to accomplish their purposes."[82] He found that each case involved "coercive action against parties outside the group."[83] From this he deduced that the rule of *per se* invalidity applied only to those boycotts "where a combination seeks by coercion, intimidation, or threats to compel outsiders to do or refrain from doing that which the group approves or condemns, and where the purpose or necessary effect of the combination is to unduly restrain or monopolize interstate commerce."[84]

Judge McNamee then launched into a penetrating analysis of the economic thrust of three specific association rules.[85] The upshot was the invalidation of one rule as an unreasonable restraint of trade and the reservation of decision as to the validity of the other two pending a trial at which further evidence would be received on the question of competitive injury.[86]

Essentially the same reading of the authorities led the Second Circuit to refuse to invoke a rule of *per se* invalidity in *Union Circulation Co.* v. *F.T.C.*[87] The boycott consisted of agreements by each of several agencies which sold magazine subscriptions

[82] *Id.* at 697–98.

[83] *Id.* at 698.

[84] *Ibid.*

[85] These rules deny membership in the association to agents dealing with insurance companies which sell insurance directly to policyholders, contribute to the overhead expense of agents, or are mutual rather than stock companies.

[86] On substantially similar facts, the court in U.S. v. New Orleans Insurance Exchange, 148 F. Supp. 915, 919–20 (E.D.La. 1957), held that the association's exclusionary membership rules violated Sections 1 and 2 of the Sherman Act. While Judge Wright deemed it unnecessary to decide the case on a *per se* basis, he stated that any group boycott or concerted refusal to deal "must, at the very least, be viewed with dark suspicion because of the commercial restraints and tendency toward monopoly inherent in such combinations." *Id.* at 920.

[87] 241 F. 2d 652 (2d Cir. 1957).

and represented "a very substantial segment of the industry,"[68] not to hire any door-to-door solicitors who had been employed by another agency during the preceding year. These "no-switching" contracts had been attacked as unfair methods of competition under Section 5 of the Federal Trade Commission Act. The agencies sought to justify the restraints on the ground that they were designed to prevent fraudulent practices by solicitors, since proper standards and discipline were difficult to maintain if employees were free to move about from one agency to another.

The Court of Appeals ruled that "when the courts or the Commission are confronted with an alleged boycott whose deleterious effect on competition is not as apparent on its face as that of the agreements which have been held illegal *per se*, they may consider its actual or potential impact upon the competitive fabric of the particular industry affected."[69] The boycott at issue, the court felt, belonged in this category. The court went on, therefore, to consider the restraint under the rule of reason. Believing it to be reasonably foreseeable that the restriction would have the effect of "freezing" the labor supply—an indispensable element of the door-to-door magazine selling trade—the court visualized that not only would competition be diminished between existing subscription agencies, but that newcomers would be prevented from breaking into the field. Accordingly, it affirmed the Commission's order, holding that the agreements constituted an unreasonable restraint of trade within the meaning of the Sherman Act.

At this stage of the game it is still too early to discern the full significance of this growing judicial disinclination to hue to the strict *per se* doctrine in the boycott field. This revival of the early Sherman Act view that certain boycotts are justifiable[70] raises a series of interesting questions of major doctrinal import.

Does the rule of reason as envisaged in these cases parallel that applicable to exclusive distributorships where the inquiry cen-

[68] *Id.* at 654.
[69] *Id.* at 656.
[70] Hopkins v. U.S., 171 U.S. 578 (1898); Anderson v. U.S., 171 U.S. 604 (1898); *cf.* U.S. v. American Livestock Com. Co., 279 U.S. 435 (1929).

ters upon the availability of competing sources of supply or outlets? Stated differently, is the controlling issue whether the boycotting group is subject to effective outside competition?

Can the concerted refusal to deal by a group enjoying monopoly power ever be justified?

Or is the rule of reason approach similar to that outlined in *Times-Picayune*,[71] where all the anticompetitive effects of the challenged restraint are objectively appraised and not merely the group's economic strength?

Must the refusal be activated by socially and economically acceptable reasons?

What significance is to be attributed to the fact that the group refusal produces serious injury to the plaintiff's business or property?

As far as the importance of monopoly power is concerned, it is interesting to note that the combination in *Insurance Board of Cleveland* controlled 80% of the market. Nevertheless, Judge McNamee refused to condemn the exclusionary rules without a detailed factual inquiry. The Seventh Circuit indicated several years ago that there would be no liability were every fire insurance company in the country to make a solemn pledge not to insure a known arsonist.[72] The Second Circuit's decision in the "no-switching" case suggests that an exclusionary agreement producing serious anticompetitive injury would not be saved by reason of its valid business purpose.

I would not hazard a guess, and certainly do not profess to know, how the Supreme Court will ultimately resolve any or all of these perplexing questions, or what weight, if any, will be given the factors of monopoly power, existence of effective uncontrolled competition, business justification, adverse effect on competition, or harm to the party boycotted. The only thing that seems reasonably clear to me is that it is not particularly fruitful to analyze the problem in terms of whether the boycott

---

[71] Times-Picayune Pub. Co. v. U.S., 345 U.S. 594 (1953).

[72] Ruddy Brook Clothes v. British & Foreign Marine Ins. Co., 195 F. 2d 86, 89 (7th Cir. 1952), *cert. denied*, 344 U.S. 816 (1952).

has a coercive effect on third parties outside the group. A group boycott by its very nature involves coercion and inescapably has an impact on the outsiders against whom it is directed. Such an approach introduces no real flexibility into the standards of legality governing joint refusals to deal.

IV

The much maligned meeting competition defense in the Robinson-Patman Act has been subjected to more than usual attention during the past year in the courts, before the Commission, and in legislative hearings. Some slight clarification has resulted, but the antitrust bar is still left in a quandary as to the precise scope of the proviso.

In *Staley*[73] the Supreme Court held that imitation of the clearly discriminatory pricing system of a competitor did not constitute meeting competition in "good faith" within the meaning of Section 2(b). This engendered the belief in some quarters that the defense required proof that the competitor's price which was being matched was itself lawful.

This gloss upon Chief Justice Stone's opinion acquired added lustre when the Supreme Court in *Standard of Indiana*[74] twice alluded, in passing, to "a lawful and equally low price of a competitor."[75] But in *Standard Oil Co. v. Brown*,[76] the Fifth Circuit recently declined to accept this dictum as controlling[77] and squarely refused to saddle a defendant with the burden of proving that the equally low price being met was, in fact, a lawful price. It recognized that such a requirement would vitiate the defense since the inquiry into "these collateral issues would be endless."[78] Were a contrary view accepted, it would be incumbent upon a defendant to ascertain if his competitor's price could

[73] F.T.C. v. Staley Mfg. Co., 324 U.S. 746 (1945).
[74] Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951).
[75] *Id.* at 238, 246.
[76] 238 F. 2d 54 (5th Cir. 1956).
[77] "There is nowhere a suggestion that the seller must carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso." *Id.* at 58.
[78] *Id.* at 58 n.7.

be cost justified, or if it too was made in good faith in order to meet the lawful and equally low price of another competitor—facts which are hardly accessible to a competing enterprise.[79] It is important to note, however, the Fifth Circuit's qualification that there would be a failure to prove "good faith" if the seller knew that the price being met was unlawful, or if that price were "inherently illegal" as in *Staley*.

On remand in *Standard of Indiana*,[80] the Seventh Circuit indicated that a seller who meets an unlawful price may not invoke the good faith defense, but found "not even a suspicion" that the prices of Standard's competitors were unlawful.[81] Significantly, the court absolved the respondent without insisting on an affirmative showing that such prices were lawful.

There is thus no inconsistency between the views of the Fifth and Seventh Circuits. The teaching of both cases is that a seller is not obliged to prove that the price of his competitor is lawful, though the defense is not available where the price being met is patently unlawful or the seller is aware of its illegal character.

This also appears to be the implication of the Supreme Court's recent *National Lead*[82] decision. Having found that the respondents had conspired to use a zone delivered pricing system, the Commission sought to prohibit not only the conspiracy, but also individual adoption of a similar system for the purpose or with the effect of "matching" competitive prices. In sustaining the Commission's power to obtain such relief, the Court stated that the proviso of Section 2(b) would be read into the order so as to permit "a seller in good faith to meet the lower price of a competitor."[83] In this connection, the Court emphasized that the statute was "designed to protect competitors in individual transactions," as distinguished from sanctioning "the use of an entire pricing system."[84] It is noteworthy that the Court did not condi-

[79] See Automatic Canteen Co. v. F.T.C., 346 U.S. 61, 69 (1953).

[80] Standard Oil Co. v. F.T.C., 233 F. 2d 649 (7th Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3183 (U.S. Dec. 18, 1956) (No. 465).

[81] *Id.* at 654.

[82] F.T.C. v. National Lead Co., 352 U.S. 419 (1957).

[83] *Id.* at 431.

[84] *Ibid.*

tion the protection of competitors in "individual transactions" on their meeting a lawful price.

Certiorari has been granted in *Standard of Indiana*.[86] While the issues appear to be primarily factual, it may be that the Court will grasp the opportunity to dispel some of the fog which still enshrouds the "good faith" defense.

In *Enterprise*,[87] the Second Circuit was asked to overturn a lower court ruling and hold that since the Robinson-Patman Act condemns discrimination having anticompetitive effects among either sellers or buyers, it also exonerates price differences which are calculated to enable buyers to meet comptition in good faith at their own level. The Court of Appeals dismissed the complaint because of a failure to prove damages and never reached this pregnant legal question. Thus we are still without any definitive appellate ruling on this aspect of the defense.

The unhappy drafting of the Robinson-Patman Act continues to plague us. In *Henry Rosenfeld, Inc.*,[88] the Commission held that the meeting competition defense was not available where the respondent had been charged with violating Section 2(d) because of a failure to proportionalize advertising allowances. The Commission recognized that the defense might have applied had the complaint alleged a Section 2(e) violation by virtue of the disproportionate furnishing of services or facilities. Nevertheless, it felt constrained to adhere to the "'barebones' language of the statute,"[88] and injected still another anomaly into the Act.

I can think of no policy justification for differentiating between Sections 2(d) and 2(e)—provisions which are complementary in nature. This decision serves to underscore the slipshod drafting of the Robinson-Patman Act and its failure to deal consistently with cognate practices of the market place.

Although the Second Circuit's *Enterprise* opinion does not shed any light on the manner in which competition may be met

---

[86] 25 U.S.L.WEEK 3183 (U.S. Dec. 18, 1956) (No. 465).

[87] Enterprise Industries v. Texas Co., 136 F. Supp. 420, 421 (D.Conn. 1955), *rev'd*, 240 F. 2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965 (1957).

[88] FTC Dkt. 6212, CCH TRADE REG. REP. (10th ed.) par. 26,068 (1956).

[88] *Id.* at p. 35,928.

under the Robinson-Patman Act, its rejection of a rule of automatic damages in a private action for price discrimination, and the denial of certiorari by the Supreme Court, represents a development of paramount importance. To put it simply, a purchaser claiming to be the victim of an unlawful price differential must *prove* that he was injured—and the extent of that injury—as a proximate result of the violation; injury and damages may not be *presumed* from the mere fact of discrimination.

The lower court in *Enterprise* had awarded the plaintiff damages based on the amount of the price differential without requiring any proof of actual damages.[89] In so doing the court relied on the decision of the Eighth Circuit in *Gus Blass*.[90] Curiously enough, Judge Smith ignored his own circuit's prior decision in *Sun Cosmetic*,[91] where Judge Learned Hand had called for proof of actual loss to the plaintiff's business in a case of discrimination arising under Sections 2(d) and 2(e) of the Act.

On appeal the defendant in *Enterprise* argued that Congress had specifically considered and rejected a rule of automatic damages in Robinson-Patman Act litigation,[92] that the point was not in issue in *Bruce's Juices*,[93] that a stray dictum in that case by Mr. Justice Jackson was uttered without the benefit of briefing, that the Eighth Circuit itself had backtracked in *Russellville Canning*,[94] and that the rationale of Mr. Justice Cardozo in a rate discrimination case under the Interstate Commerce Act was analogically apposite.[95] In the *ICC* case a unanimous Supreme Court had ruled that:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .

[89] Enterprise Industries v. Texas Co., 136 F. Supp. at 422–23.
[90] Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F. 2d 988, 996 (8th Cir. 1945), *cert. denied*, 326 U.S. 773 (1945).
[91] Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F. 2d 150, 153 (2d Cir. 1949).
[92] See H.R.REP. NO. 2951, 74th Cong., 2d Sess. 8 (1936).
[93] Bruce's Juices v. American Can Co., 330 U.S. 743, 757 (1947).
[94] American Can Co. v. Russellville Canning Co., 191 F. 2d 38, 55 (8th Cir. 1951).
[95] I.C.C. v. U.S., 289 U.S. 385 (1933).

> The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."[m]

The Court analyzed the nature of the actionable harm flowing from discrimination as follows:

> "If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."[n]

On the basis of the clear legislative history and the persuasive authority of *ICC*, the Second Circuit reversed and dismissed the *Enterprise* complaint, since the plaintiff had been able to show neither a diversion of sales nor a lowering of his price as a consequence of the price differences.

It has been said in some quarters that *Enterprise* makes it virtually impossible for a plaintiff to prevail in a treble damage action for price discrimination. It is undoubtedly true that when the nonfavored buyer sustains no injury to his business or property, which Section 4 of the Clayton Act makes a condition precedent to maintenance of a private action, it will be impossible to sue for treble damages. Recovery, however, is not precluded where the discrimination produces harm either through diversion of business or loss of profits resulting from a reduced market price. Were a rule of automatic damages sanctioned, a bonanza would be conferred on private suitors even in the absence of proof of injury. It is not true that it can rationally be assumed that price discrimination invariably brings injury in its wake.

---

[m] *Id.* at 389–90.
[n] *Ibid.* at 390–91.

One has only to study the record in the *Enterprise* case to realize why such an assumption cannot safely be made.

When all is said and done, one comes back to the fundamental premise of a private action for treble damages—injury to the plaintiff's business by reason of a violation of law. Without proof of injury and damages, there certainly can be no recovery for an infraction of the Sherman Act. I can think of no reason why the same proof should not be required where a claim is asserted under Robinson-Patman.

V

By and large, antitrust consent decrees make rather dull reading and contribute little to the practitioner's store of substantive knowledge. Frequently, these judgments are cast in a stereotyped mold geared to prevent one or more well known generic restraints. Sometimes the boilerplate is coupled with tailor-made provisions designed to cope with more unusual patterns of conduct. But since these decrees are not accompanied by any findings of fact or adjudication of illegality, and since they are often the product of hard bargaining and represent a compromise, they rarely provide any insight into how the court would have decided the case had it been litigated.

Within the past year, however, I ran across a consent decree which made exceptionally interesting reading. It was entered by the United States District Court for the Southern District of Georgia in a price-fixing suit brought by the Department of Justice against a trade association of movers of household goods.[28] I had always supposed that price-fixing was illegal *per se* and that a trade association engaging in such activity might be dissolved. The decree did nothing to disturb these preconceived notions. The defendants were enjoined from price-fixing and ordered to dissolve the association. The startling thing about the decree was that it was entered without the consent of the Government. Only the defendants had acquiesced in its entry. As is customary in the case of all consent decrees, the judgment recited that there had

[28] U.S. v. Aero Mayflower Transit Co., Inc., 1956 Trade Cases par. 68,526 (S.D.Ga. 1956).

been no trial or adjudication of any issue of fact and that the defendants had not admitted the commission of any illegal acts charged in the complaint.

To the best of my knowledge, this marks the first occasion on which a court has accepted a consent decree in an antitrust action without the agreement of both parties. Back in 1940, a similar unilateral proffer was rejected by another federal district court.[99] Personally, I have always proceeded on the assumption that if a proposed consent decree was not satisfactory to the Government, a defendant had no judicial recourse, short of defending the case on the merits or admitting the allegations of the complaint and then endeavoring to persuade the court to grant only limited relief. If the federal court in Georgia is correct, all of us may have been missing a good bet.

But on closer analysis, precisely what is a consent judgment worth to a defendant when it is obtained without the approval of the Government?

Since the court has jurisdiction of the parties and subject matter, the decree in all probability would not be deemed a nullity.[100] I would expect that if the defendant wilfully contravened its provisions, he would be subject to punishment for contempt at the suit of the Government. I hardly think that it would be a defense to assert that the Government did not consent to the issuance of the decree in the first instance.

It seems equally clear that the decree could not be introduced in evidence against the defendant as *prima facie* evidence under Section 5 of the Clayton Act[101] in a private treble damage action. Regardless of whether such a decree is a true "consent judgment" within the meaning of statutory proviso, it would be inadmissible because it was "entered before any testimony has been

---

[99] U.S. v. Hartford-Empire Co., CCH TRADE REG. REP. (8th ed.) par. 25,548 (N.D.Ohio 1940).

[100] Stoll v. Gottlieb, 305 U.S. 165, 171–72 (1938); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 465 (1874); see Walling v. Miller, 138 F. 2d 629, 631 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944); 7 MOORE, FEDERAL PRACTICE 259–71 (2d ed. 1955).

[101] 69 STAT. 283 (1955), 15 U.S.C. §16.

taken."[102] Moreover, the defendant has not admitted any violation, and Section 5 can only be invoked where the decree attests to an infraction. In view of the absence of any testimony, findings of fact, or determination of illegality, it is difficult to imagine as to what matters such a decree might operate as an estoppel.[103]

So far, so good. The defendant has lost nothing by circumventing the Government and taking his consent decree directly to the court. The fly in the ointment lies in the Government's right of appeal. If the Government is truly dissatisfied with the relief granted by the district court, there is no doubt about the fact that it can bring the matter before an appellate tribunal.[104] Since there has been no trial and the defendant has admitted nothing (except jurisdiction perhaps),[105] the district court was in no position to make the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.[106] Manifestly, without any inkling as to what the defendant did or did not do, the reviewing court has no guideposts to enable it to determine whether the court below abused its discretion in denying the

---

[102] Section 5(a) provides as follows:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

[103] *Cf.* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[104] U.S. v. Hartford-Empire Co., CCH TRADE REG. REP. (8th ed.) par. 25,548 (N.D.Ohio 1940); U.S. v. Institute of Carpet Mfrs. of America, 1940–43 Trade Cases par. 56,097 (S.D.N.Y. 1941); see Swift & Co. v. U.S., 276 U.S. 311, 324 (1928); Walling v. Miller, 138 F. 2d 629, 631 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1949).

[105] The decree in *Aero Mayflower* even lacks the jurisdictional declarations typically found in consent decrees to the effect that (1) the court has jurisdiction over the subject matter and parties, and (2) the complaint states a cause of action under the antitrust laws.

[106] Of course, where both sides consent to a decree, there can be no appeal on the merits and therefore findings of fact or conclusions of law are unnecessary.

Government additional relief. Indeed, it might even be questioned whether the lower court, by issuing an injunction while ignorant of the facts, had any basis on which to exercise its discretion in the first place. Confronted with an inadequate record, I fail to see how the appellate court would have any alternative but to reverse the judgment and remand the case for appropriate findings by the trial court. This would be tantamount to ordering a trial of the case, unless the Government and the defense could agree on the form of a consent order or at least to stipulate the facts. In short, the parties would be right back where they started.

If the Government were powerless to prevent a defendant from obtaining a unilateral consent decree, the result would be little short of chaotic. The courts would be inundated with requests by private litigants to issue decrees to their liking. A rejection of one request might serve only to breed another. Instead of having a single centralized and informed agency providing a modicum of consistency and uniformity in the relief meted out, several hundred district judges, acting without knowledge of the facts, would be dispensing all sorts of different decrees dealing with what in many instances might be essentially similar situations. There would be a complete frustration of the administrative process. Decrees based on unilateral consent would only add to the uncertainties which already abound in this field.

A parallel problem in the relationship between the executive and judicial branches of the Government arises in the acceptance of the plea of *nolo contendere* in criminal prosecutions. The primary purpose of a consent decree is to resolve the pending controversy by affording the public appropriate relief without exposing the defendant to treble damage liability as a result of the *prima facie* effect of the judgment. By the same token, the *raison d'etre* for a plea of *nolo contendere* is to vindicate the public interest through the imposition of criminal penalties without prejudicing the defendant in a later civil action through operation of the doctrine of estoppel. There is a specific federal rule

granting discretion to the court in receiving a plea of *nolo*[107] but there is no comparable civil rule lodging a like discretion in the judicial acceptance of a consent decree.

Several recent decisions have served to highlight the active role which the judiciary takes in considering whether to take a plea of *nolo contendere*.[108]

Refusing a *nolo* plea in *Standard Ultramarine*,[109] a price fixing case, Judge Weinfeld expressed the view that it was not in the public interest to deprive private treble damage suitors of the evidentiary benefits of an adjudication of guilt under Section 5 of the Clayton Act. The Department of Justice had opposed the plea on that very ground, but Judge Weinfeld made clear that he did not attach controlling significance to the Government's opposition. The position of the prosecutor was deemed only one of several relevant factors, such as the nature and duration of the claimed violation, the size and power of the defendants, the impact of their alleged conduct on the economy, and "whether a greater deterrent effect will result from conviction rather than from acceptance of the plea."[110]

The difficulty with Judge Weinfeld's emphasis on Section 5 of the Clayton Act as a consideration in declining a *nolo* plea is that his rationale applies with equal force to consent decrees. Unless the court would reject the tender of a consent judgment under the same set of facts—and I am using "consent" in its ordinary meaning to denote acquiescence by both sides—I can perceive no logical reason for turning down a plea of *nolo*. In neither event will the judgment be available to private parties. And since the courts traditionally have bowed to the decision of the Department of Justice in approving consent decrees, I think

---

[107] Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C., provides in pertinent part: "A defendant may plead not guilty, or, with the consent of the court, nolo contendere."

[108] U.S. v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955); U.S. v. Cigarette Merchandisers Ass'n, 136 F. Supp. 212 (S.D.N.Y. 1955); U.S. v. B. F. Goodrich Co., 1957 Trade Cases par. 68,713 (D.Colo. 1957).

[109] U.S. v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955).

[110] *Id.* at 172.

it should be a most extraordinary case before a judge precludes a *nolo* plea when the Government acquiesces.

At least two district courts have disagreed with Governmental opposition to pleas of *nolo contendere*. In one case Judge Sugarman accepted the plea over the objection of the Department.[111] But the judge was careful to point out that private parties would not necessarily be deprived of the benefits of Section 5 because the Government had instituted a companion civil action against the same defendants.

However, the issue was squarely met by Judge Breitenstein a few months ago when he permitted the defendants in a price-fixing case to change their pleas from not guilty to *nolo* despite strenuous Governmental objection.[112] He pointed out in his opinion that the *nolo* plea has always existed in the federal courts, that it is authorized by a specific rule of procedure, that the plea has been accepted in many antitrust prosecutions, and that Congress did not see fit to curb its use when it amended Section 5 in other respects two years ago.[113] From this, Judge Breitenstein drew the inevitable conclusion that "the intent of Congress has been to retain the plea of *nolo contendere* in antitrust cases and that the use of such a plea if permitted by the Court is not contrary to the public interest."[114]

The court then turned to the factors which should control the exercise of its discretion. It did not take the position that a plea of *nolo* would be accepted willy nilly. Rather it declared that the defendants had to present "an exceptional circumstance" warranting favorable exercise of the court's discretion.[115] In this connection, the judge rejected the defense argument that the prospect of treble damage litigation which confronted the defendants

[111] U.S. v. Cigarette Merchandisers Ass'n, 136 F. Supp. 212 (S.D.N.Y. 1955).

[112] U.S. v. B. F. Goodrich Co., 1957 Trade Cases par. 68,713 (D.Colo. 1957).

[113] The 1955 amendments made the estoppel provisions of Section 5 applicable to suits brought by the United States for injuries to its business or property. The second paragraph of Section 5, which dealt with suspension of the running of the statute of limitations, was altered to accommodate the uniform four-year period of limitations enacted at that time.

[114] U.S. v. B. F. Goodrich Co., 1957 Trade Cases at p. 72,878.

[115] *Id.* at p. 72,876.

was such an exceptional circumstance. Otherwise, as the judge properly pointed out, the exception would most certainly swallow the rule. In the last analysis the court was prompted to accept the plea because the congested status of its docket "is such that public interest requires that everything be done which can properly be done to expedite the trial and disposition of lawsuits."[116] But it indicated that calendar congestion is not deemed a controlling factor for all cases.

To my mind, Judge Breitenstein's analysis of the irrelevance of Section 5 in exercising judicial discretion under Rule 11 seems unassailable. A judge to whom a plea of *nolo* is tendered in an antitrust case should consider the same factors that he would consider in evaluating the plea in any criminal prosecution. He should give no thought to the defendant's possible treble damage exposure, either in accepting or rejecting the plea. Acceptance of the plea on that score is destructive of the court's discretion. Rejection on that ground precludes the use of the plea in the settlement of criminal antitrust cases.

In short, while the purposes of both consent decrees and *nolo* pleas coincide, their proper utilization must take into account the divergent statutory and administrative framework into which each is cast. A procedure requiring a bilateral agreement should not be accepted on any other basis by the courts. By the same token, a device essentially unilateral which focuses on the discretion of the judiciary should not be subject to the arbitrary veto of the prosecutor or rejected for reasons essentially irrelevant to the proper purpose and use of the plea. Unless these simple tenets are observed, instruments admittedly performing useful and desirable functions in the settlement of controversies will lose much of their effectiveness.

---

[116] *Id.* at p. 72,878.

Recent Decisions of the United States Supreme Court

By EDWIN M. ZIMMERMAN and JOHN D. CALHOUN

UNITED STATES V. DU PONT & CO.

353 U.S. 586 (1957)

Suit was brought in 1949 under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The Section 7 portion of the complaint was based upon the purchase by du Pont in the 1917–1919 period of a 23% stock interest in General Motors.

The District Court for the Northern District of Illinois dismissed the complaint, finding in a 100 page opinion that the Government's evidence did not support the conspiracy and monopolization charges under the Sherman Act, and that the absence of restraints in the thirty years since the stock acquisition indicated that there was no basis for a finding of a reasonable probability of a restraint, such as would constitute the stock acquisition a violation of the Clayton Act. 126 F. Supp. 235, 335.

The case came to the Supreme Court on direct appeal under the Expediting Act. The Supreme Court held, in a 4 to 2 decision, that Section 7 of the Clayton Act was violated. It did not pass on the Sherman Act allegations. Justice Brennan wrote for the Court. Justice Burton wrote the dissent, in which Justice Frankfurter joined. Justices Clark, Harlan and Whittaker took no part in the consideration or decision of the case.

In reaching the conclusion that Section 7 was violated, Justice Brennan had to cope with several basic questions on antitrust law and on the interpretation of the pre-1950 version of Section 7, which was involved in this suit.

The initial question in the case was whether the pre-1950 Section 7 applied to a vertical acquisition. The 1950 amendment was passed to "make it clear" that the Clayton Act applied to all types of mergers and acquisitions, vertical as well as horizontal. Examining legislative history, the Court held that the prior version of Section 7 did in fact apply to vertical acquisitions and that the 1950 amendment in this respect merely reconfirmed existing policy.

The Court next turned to the inevitably troublesome question of defining the relevant market. The Court held that automobile finishes and fabrics have "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all finishes and fabrics to make them 'a line of commerce' within the meaning of the Clayton Act." (P. 594). Since General Motors accounted for almost half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics were deemed to amount to about half of that "market." The Court concluded that since "quantita-

tively and percentagewise duPont supplies the largest part of General Motors' requirements" for finishes and fabrics, duPont had a substantial share of a relevant market.

In handling the problem of market definition, the Court formulated the antitrust issue by stating that the violation of Section 7 would come about if there were a likelihood that competition may be foreclosed in a substantial share of the relevant market. (P. 595). Significantly, this definition of the problem is supported by a citation to *Standard Oil Company of California* v. *United States*, 337 U.S. 293, the well-known "quantitative substantiality" decision under Section 3 of the Clayton Act, the applicability of which to Section 7 cases has been much mooted in Law Review articles and speeches. That the Court's recourse to the *Standard Stations* case is not accidental is confirmed by its citation of that case in footnote 11 of its opinion. (P. 593).

Justice Brennan next turned to the argument that the Government could not maintain the action in 1949 because Section 7 was applicable only to the acquisition of stock and not to the holding or subsequent use of the stock. He held that the aim of Section 7 was "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil which may be at or any time after the acquisition, depending upon the circumstances of the particular case." (P. 597).

Meeting next the argument of the District Court that the passage of thirty years between the time of acquisition and the time of suit without illegal restraints negated any "reasonable probability" of an illegal restraint, Justice Brennan reviewed the history of the relationship between du Pont and General Motors discussed the intent of duPont in making the acquisition, and concluded that the facts indicated the existence of an illegal restraint in that stock ownership had been used to promote duPont's position as a supplier of General Motors.

The judgment of the lower court was reversed and the case was sent back to the District Court for determination of the relief to be granted.

The dissent, written by Justice Burton and joined by Justice Frankfurter, takes the opinion of the Court to task point by point. It argues that the original version of Section 7 of the Clayton Act did not apply to vertical acquisitions and cites legislative history, administrative practice, and judicial interpretation in support of its position.

The dissent next challenges the Court's conclusion that the time the suit is brought is the relevant time for considering the effects of the acquisition. The dissent asserts that the language of the statute clearly requires that the acquisition be unlawful when made and points to other language in the Clayton Act which addresses itself specifically to the unlawfulness of the "use" of stock. The dissent points out that the result of the Court's opinion is "that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock." (P. 622). The dissent remarks: "The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result,

under this test, in rendering the original lawful acquisition unlawful *ab initio.*" (P. 623).

The dissent acknowledges that the history of the subsequent events following the acquisition is relevant, but asserts that the relevance pertains to the manner in which the history bears on the central question of whether the illegal effects were reasonably probable at the time of the acquisition. Turning to what the thirty-year history following the acquisition revealed, the dissent adverts to the record which disclosed that despite the stock ownership competitors of duPont continued to sell to General Motors and that duPont's commanding position was the result of its outstanding sales effort and its attempts to meet General Motors' changing requirements, rather than its stock ownership. The dissent takes the Court to task for overturning findings of fact based on oral testimony and contemporaneous documents, which findings were not clearly erroneous.

Finally, the dissent sharply criticizes the majority's definition of the market as consisting of the automobile paint and fabric market. The dissent notes that the majority opinion does little to explain why automobile finishes and fabrics are "sufficiently peculiar" to be separated from finishes and fabrics used on locomotives and other appliances. When looked at in the context of the total industrial market for finishes and fabrics, du Pont's sales of finishes to General Motors in 1947 constituted less than 3.5% of all sales of industrial finishes, and du Pont's sales of fabric to the automobile industry constituted only about 2% of the total market for fabric. This, the dissent argued, established that the government did not prove that the stock acquisition subsantially threatened the competitive opportunities available to others.

* * *

This obviously is one of the important antitrust decisions of recent years. Although the fact that two giant corporations were involved undoubtedly played a role in shaping the decision, the temptation to treat the case as a freak should be avoided. The fact remains that this case is now on the books. Although it is concerned with the pre-1950 version of Section 7 there is a sufficient similarity between the amended and the old version to assure that this case will provide precedent for future decisions, when such precedent is wanted. It will influence the policy of the antitrust enforcement agencies, and will guide the decisions of the federal lower court judges.

The controversy surrounding the decision in part is the result of the following: the fact that the pre-1950 Section 7 received a basic interpretation seven years after it was amended; the fact that the Section 7 complaint, presented as a minor appendage in a Sherman Act suit, was used as basis for decision; and the fact that comprehensive findings of the trial judge were in effect, if not in form, up-ended.

These factors, while increasing the sensitivity to a sweeping decision, do not necessarily make the decision a poor one. Perhaps the point at which the decision is most vulnerable, however, lies in the definition of the relevant market. The dissent appears to be correct when it accuses the majority

of asserting that automobile paints and fabrics have special characteristics which separate them from other paints and fabrics without presenting substantiating facts for the distinction. It is no surprise to find the three dissenters in the *Cellophane* case uniting behind Justice Brennan here to form the majority. Cavalier as the treatment of market definition appears to be, however, this does not necessarily mean that the *Cellophane* case has been scuttled. The fact that the Court purported to find a difference in the characteristics of the products suggests at least external respect for *Cellophane,* and the doctrine of that case still lives, perhaps to receive a more gracious treatment when the three abstaining justices of this case vote.

The case treats a vertical acquisition. Its implications for horizontal and conglomerate acquisitions, where foreclosure of a market is less readily demonstrated, are not clear. Conceivably, the market may be defined in less narrow terms in a horizontal merger.

The opinion appears to adopt the *Standard Stations* test for Section 7 problems. It may be that the meaning of "substantial share" has been given greater precision by the decision in this case. In *Standard Stations* 6.7% of the relevant market was considered "substantial." Here, the Court avoided a market definition which left duPont with only a 3.5% position, and utilized the narrow definition which significantly increased the duPont percentage. It is also of some interest that the Court did not rest merely on the fact that the dollar volume of duPont's sales were substantial.

Another matter of major significance for counselling purposes resulting from this decision and probably the matter most difficult for practitioners to contend with will be the necessity of attempting to envisage the ripening of acquisitions into an illegal status as a result of events taking place after the acquisition.

WATKINS V. UNITED STATES

(June 17, 1957)

The "fundamental principles of the power of the Congress" were examined in this case, involving a conviction for contempt of Congress alleged to have been committed during a hearing before a Congressional investigating committee.

Petitioner had appeared as a witness in compliance with a subpoena issued by a sub-committee of the Committee on Un-American Activities of the House of Representatives. He answered questions with respect to his past conduct and political associations. He also disclosed his knowledge in the past of certain persons he believed to be present members of the Communist Party. He refused, however, to tell the Committee whether certain named persons had been past members of the Communist Party when he believed they were no longer members. He did not plead the Fifth Amendment but instead rested on the basis that the questions were outside the proper scope of the Committee's activities.

Petitioner was indicted on contempt of Congress grounds under 2 U.S.C.

§192 and found guilty by a District Court. After a three judge panel of the Court of Appeals for the District of Columbia reversed the conviction on appeal, the full bench upon a hearing *en banc* affirmed the conviction.

The Supreme Court, reviewing the conviction by certiorari, reversed the judgment of the Court of Appeals and remanded the case to the District Court with instructions to dismiss the indictment. Chief Justice Warren wrote for the Court. Justice Frankfurter concurred. Justice Clark was alone in his dissent. Justices Burton and Whittaker took no part in the consideration or the decision of the case.

The Court asserted that investigation by, as well as a statute of Congress, "is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly." Therefore, the First Amendment could be invoked during the course of a legislative hearing. The Court pointed out that in *United States* v. *Rumely*, 345 U.S. 41, the problem raised by the applicability of the First Amendment led to a narrow construction of the resolution prescribing the authority of a Congressional committee. "When First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter." The Court seemed to regard the problem as one of balancing the interest of Congress in demanding the disclosures against the private rights affected by the disclosures.

The Court noted that the authorizing resolution by which Congress empowered the Committee to act was so loosely and broadly framed that the Congress retained virtually no control over the Committee.

Because of this situation the Court complained it was unable to determine whether the Committee was acting within its prescribed standards. Moreover, the Court warned a broad gap is set up between the legislative body that is ultimately responsible for the use of the investigative power and the actual exercise of that power. This problem becomes especially acute where constitutional liberties are being affected. "Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need."

With these considerations as background, the Court turned to the disposition of the precise problem before it. Because a witness in contempt of Congress is tried under a criminal statute, the witness has the accused's usual right to have available in reasonably precise terms information revealing the standard of criminality applicable to the offense charged. Since the crime is refusal to answer "any question pertinent to the question under inquiry" the standard of criminality includes the pertinency of the questions propounded to the witness. When the witness has to decide whether or not to answer, he must be in a position to know whether the question was pertinent. For this purpose he must have a fairly explicit and clear idea of the subject to which the interrogation is deemed pertinent.

In this case, according to the majority, the charter authorizing the committee was so broad, and the statements of the Chairman so indefinite, that it was impossible to ascertain precisely what the question under inquiry consisted of, and the witness had no opportunity to determine whether his action would be criminal. Accordingly, the Court held that the petitioner's con-

viction for refusing to answer was invalid under the due process clause of the Fifth Amendment.

The dissents regards the charter as sufficiently precise as to the committee's functions, finds the purpose of the inquiry set out with clarity, and questions whether any First Amendment rights were threatened.

* * *

This case represents another procedural link in a new chain of cases which slowly are circumnavigating the old notion that Congressional investigating power is for all practical purposes unlimited. The effect of decisions such as this, and of *Rumely, Quinn,* and *Emspak* is in the first instance to appear to require nothing more than refinement in procedure, and definition in the delegation of Congressional authority. But this may well be another instance of substantive law flowing from the interstices of procedure.

Recent Decisions of the New York Court of Appeals

By JOSEPH H. FLOM and SHELDON OLIENSIS

MATTER OF NEW YORK COUNTY LAWYERS ASSOCIATION (ROEL)

(3 N.Y. 2d 224, 144 N.E. 2d 24, July 3, 1957)

The Court of Appeals, in a five to two decision, has severely narrowed the scope of practice by lawyers of foreign jurisdictions within the State of New York.

Roel, a Mexican lawyer resident in New York but not admitted to practice here, advertised as a "Mexican Lawyer in N.Y." and advised members of the public on Mexican law. Roel did not deny that his activities included: (i) preparation of legal papers required for the institution of divorce actions in Mexico, which papers he forwarded to a lawyer retained by him in Mexico to represent the client, (ii) taking all further steps necessary to assist in the procurement of such divorces, and (iii) giving legal advice, rendering legal services, and preparing various legal papers pertaining to the laws of Mexico. Roel rendered these services and gave this advice in New York to citizens of New York.

Concededly Roel did not give advice as to New York law; in his retainer agreements in divorce actions the client was requested to state that Roel assumed no responsibility concerning the legal effect of the divorce decree outside Mexico, and that the client had consulted an American lawyer of his own State.

Petitioner brought this proceeding pursuant to Section 750 B of the Judiciary Law, asserting that Roel's activities constituted the unlawful practice of law under Section 270 of the Penal Law. Roel argued, *inter alia*, that he did not practice "law" since Mexican law was not "law" in New York and that, even if he was practicing "law," he was not violating Section 270 which should be construed to relate to "New York law" alone.

The Supreme Court agreed with Petitioner, adjudged Roel in contempt and enjoined him, among other things, "from practicing or assuming to practice law in any manner whatsoever, and from giving and furnishing any legal advice and opinions and rendering legal services of any kind, nature and description."

The Appellate Division unanimously affirmed the order of the Supreme Court; the Court of Appeals affirmed.

Judge Froessel, writing for the majority, held:

> "Whether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice. Likewise, when legal documents are prepared for a layman by a person in the business of preparing such documents, that

person is practicing law whether the documents be prepared in conformity with the law of New York or any other law."

Judge Froessel further ruled that Section 270 was not limited to the practice of New York law, noting that the Court had previously found violations of that Section by persons "engaging in the practice of Federal law."

The Court was particularly concerned with the fact that foreign lawyers are not subject to discipline by the courts of this State and that to permit them, as in the case of Mexican divorces, to advise on foreign law without advising on its impact in this State would give the foreign lawyer's client "utterly inadequate protection." The Court also rejected an argument advanced by this Association, which filed a brief *amicus,* that a distinction should be drawn between the right of a Mexican lawyer to advise the public in divorce matters, which may affect New York status, and the right of foreign lawyers generally to advise with respect to foreign law.

Judge Van Voorhis wrote the dissenting opinion, in which Judge Fuld concurred. He stated that Sections 270 and 271 of the Penal Law prohibited only advising with respect to New York law "but do not forbid advising in reference to the laws of other countries or the preparation of papers for use in the courts of other countries where questions of status, property or other rights or obligations in New York are not affected." Judge Van Voorhis noted that the principle underlying the lower court's injunction would also prevent the giving of legal advice in New York by foreign lawyers on matters regarding business, financial or personal transactions anywhere in the world. He further stressed that the scope of the majority opinion, if adopted by foreign jurisdictions, would preclude the performance of services by unlicensed American lawyers in the foreign country. Accordingly, the dissenters thought the Supreme Court's injunction should be limited to the performance of legal services for New York residents in connection with Mexican law which included advice as to the effect of such law on legal status or rights under New York law.

The majority states that the problem "is solely within the province of the Legislature." Conceivably, the decision may give impetus to legislation, hitherto unsuccessful, to license foreign attorneys to deal with matters exclusively concerning foreign law. Until the enactment of such legislation, however, the outlook is for more rigorous enforcement of the law as construed by this decision. The Attorney General of this State recently announced the appointment of a special consultant to devise means for assisting bar associations in combatting unqualified practitioners. One bar association spokesman was quoted as stating that the need was particularly in the area of foreign law. See Herald Tribune, September 23, 1957; Times, September 23, 1957, "Study on Fake Lawyers."

INMAN V. BINGHAMTON HOUSING AUTHORITY

(3 N.Y. 2d 137, 143 N.E. 2d 895, July 3, 1957)

The much-battered defense in negligence actions of "lack of privity" has suffered another reverse in a recent decision of the Court of Appeals. In

this decision, the Court unanimously concluded that the doctrine of *MacPherson* v. *Buick,* which makes a manufacturer of an "inherently dangerous chattel" liable to the ultimate user for negligence, imposes similar liability on architects and builders.

Six years after an apartment house had been completed and turned over to the Housing Authority, plaintiff brought this action against the Authority, as owner, and against the architects who designed the structure and the builder who constructed it. The action was for personal injuries suffered by a child of a tenant who fell off a stoop.

The complaint alleged three defects in the design and construction of the apartment house: the absence of a guardrail on the stoop, the fact that the rear door opened outwards, forcing persons on the stoop to step back near the edge when the door was opened, and the fact that the step to the stoop did not extend its entire length.

Special Term dismissed the causes of action against the builder and architects. The Appellate Division, Third Department, reversed, holding that the complaint stated causes of action against the builder and architects under the *MacPherson* doctrine.

The Court of Appeals, in an opinion by Judge Fuld, agreed with the Appellate Division that *MacPherson* was applicable, citing recent decisions in other jurisdictions to the same effect and noting that the liability of suppliers of personal property could not logically be distinguished from the "liability of architects or builders for their handiwork."

While thus broadening the area to which *MacPherson* is applicable, the Court of Appeals nonetheless refused to relax the requirements of that doctrine. An essential element of liability under *MacPherson,* the Court noted, is that the cause of the injury be "a latent defect or an unknown danger." Here, since all the defects charged were "patently obvious," that requirement was not met, and the instant complaint against the builder and architects therefore fell outside the *MacPherson* formula. Accordingly, the order of the Appellate Division was reversed and those portions of the complaint were dismissed.

The court also disposed of third-party actions which the Authority had brought against the builder and architects, in each case based both on an alleged common law right to indemnification and on provisions of contract. The claims based on common law rights, dismissed by Special Term but upheld by the Appellate Division, were dismissed by the Court of Appeals, which held that the builder and architects had "breached no duty and were, therefore, guilty of no negligence." Moreover, under the allegations of the complaint, the Authority was guilty of active negligence in maintaining and continuing a known defective condition.

The contractual claim against the architects, dismissed by the Appellate Division, was not appealed. The contractual claim against the builder, however, was upheld both by Special Term and the Appellate Division. The builder's contract indemnified the Authority against, among other things, the "risk of causing injuries to persons * * * arising out of or in connection with the performance of the Work, whether sustained before or after Final Payment."

Unlike the two lower courts, the Court of Appeals felt that this language, while broad, could not reasonably be construed to hold the builder liable for an accident occurring six years after the job had been completed and accepted and not arising from any defect in workmanship or in any material used. The Authority's contractual claim against the builder was accordingly also dismissed.

The Court of Appeals' extension of the *MacPherson* doctrine to builders and architects constitutes an important—but, in view of the trend of the law in this and other jurisdictions, not surprising—change in negligence law. It is curious to note that the Court chose to make this important extension of *MacPherson* in a case where there was no necessity to pass on the point, since, whether or not *MacPherson* applied, the complaint would still have been dismissed as to the builder and architects.

The opinion of the Court has other interesting facets. While the Appellate Division was at pains to reconcile the case with the requirement of an "inherently dangerous" chattel, the Court of Appeals seemed relatively untroubled by this aspect. Since the label "inherently dangerous" was originally restricted to poisons and explosives and was expanded only by *MacPherson* to include such things as automobiles with defective wheels, it is evident that the term has, over the years, acquired considerable flexibility.

To attorneys whose clients must sign indemnification agreements, the third-party litigation flags a warning. While the builder was eventually released by the Court of Appeals, the two lower courts both refused to dismiss the claim against it although, the Court of Appeals held, it is "inconceivable" that the builder would have accepted such liability.

Where possible, it would seem to behoove attorneys for builders to insist upon inclusion in indemnification agreements of protective language explicitly excepting liability for such claims as the present one, which occur long after completion of the job and which, in the Court's language, do "not arise from any defect in workmanship or in any material used."

Committee Reports

COMMITTEE ON MUNICIPAL AFFAIRS

NEED FOR MANAGERIAL ASSISTANCE IN THE OFFICE OF THE MAYOR OF THE CITY OF NEW YORK

The office of the Mayor of the City of New York, as now set up by law, demands more energy and physical endurance than is given to any one person. This year of mayoralty election is the time to give help to the Mayor, not merely to select him. What is sorely needed by the Mayor and by the City is strong and clearly defined managerial assistance.

Responsibility is centered in the Mayor for every part of the great complex of a two billion dollar a year organism. This answerability of the Mayor is a valuable feature of our City government, one important to be preserved and not to be watered down. But the Mayor does not have, and he must be given, machinery of government adequate to enable him to fulfill his responsibilities.

The great need for managerial assistance was found to exist four years ago by two official state and city commissions, the Devereux Josephs Commission (Temporary State Commission to Study the Organizational Structure of the Government of the City of New York) and the Luther Gulick Committee (Mayor's Committee on Management Survey). We quote one simple statement of the conclusions they reached: that the Mayor, the Comptroller, the Board of Estimate and the City Council "would be the first to admit that the work to be done has outgrown the management machinery we have. They are swamped with the present tasks; they work long hours and are forced to deal with almost everything on a crisis basis." This was not a criticism of the individuals then holding office. It was a finding of the inadequacies of the government structure provided by the Charter and the Administrative Code.

Our Committee is of the opinion that there is one specific aspect of the work of these two investigating bodies which should be given immediate attention. What is immediately needed is the expansion and strengthening of the office of city administrator—now a mere advisor and "trouble shooter"—by making him the general manager of the City's day-to-day operations. He would of course be subject, directly and completely, to the Mayor.

A very brief analysis of the Mayor's duties and responsibilities as now constituted, and as found by these two commissions, shows how pressing is the need for such a change in the City's structure. Every day the Mayor must function in four different ways: not only must he give the City his leadership, but he must exercise *party leadership* as well; he is the *ceremonial*

head of the City; his is the ultimate *policy* making responsibility; finally, he is the *administrative* head of the entire City government. The first three duties—political, policy and ceremonial—cannot be delegated. The legitimate party activities of the Mayor are vital to the functioning of democratic government. His leadership in broad policy making is beset with such urgent and emergent problems as traffic congestion, education, welfare and finance. It needs emphasis, too, that the Mayor's ceremonial obligations must not be underestimated, either in their importance to the City or in their personal demands on the Mayor's time and person.

The administrative functions are in a different class, however. This is the responsibility for the daily operations of the City departments—more than fifty, huge in number as well as in size—which furnish the City its government services.

Subtract from our human Mayor's twenty-four hours a day, the time taken by ceremonial and policy making duties and the political ones, and there is not enough time left to do even the job of conferring with the commissioners who head the fifty departments and agencies. There is no time to hear the details of the inevitable, innumerable and inescapable conflicts in jurisdiction or plans among these departments or between the director of the budget, or of personnel, and the departments. This is not the fault of either the Mayor or of the commissioners. All informed citizens and groups know that the limitations of time make it impossible for the Mayor to see most of his commissioners for more than cursory meetings, if at all.

What has happened is that there is in fact no general director or manager of the City's operations; a vacuum exists in our City government.

The solution is by no means shrouded in mystery or obscurity. On the eve of the 1953 mayoralty election, the Devereux Josephs Commission recommended the creation of a new office in the City government, a city administrator. This new officer would be the City's administrative head, answerable only to the Mayor. All commissioners would take their problems to the city administrator for discussion and decision. With the Mayor's approval, he would appoint or remove, the heads of most of the City's departments. He would have initial responsibility for budget making. He would be appointed by and dischargeable by the Mayor, answerable only to the Mayor.

These recommendations evidently impressed the incoming administration; even before it took office, the outgoing administration, at the behest of the new, created a new office, and borrowing the name and some outward form from the State Commission's report, called it "city administrator" (Local Law 189 of 1953, signed by Mayor Impellitteri on his last day of office, December 31, 1953). Although, under Luther Gulick and now under Charles F. Preusse, the new office has proved to be a valuable one, the present city administrator is given by law only advisory, or staff, functions. Although he is given by law the power "to supervise and co-ordinate" the work of the city agencies, he is given no power to appoint the commissioners and other agency heads, and is given no power over budget or personnel. This has been construed in these four years (as was evident from the beginning),

as giving no direct authority to do the real job, the direction of the day-to-day administration of the City. In brief, what is needed to direct and control the daily operations of the City's business is a counterpart of the executive vice-president of a great corporation. To carry out the analogy, what the City now has is a mere advisor to, or assistant to the president of the company.

This Association in 1953 endorsed the goal of the Devereux Josephs Commission at its public hearings (held in our Meeting Hall). Other leading civic groups joined in this endorsement. The four years that have elapsed, have made it clear that the rapid expansion of City government and expenditure will get out of hand if the City government is not modernized. This is in every sense a non-partisan recommendation, one that should be welcomed by the Mayor, the city administrator, and the commissioners.

It is recommended that the office of city administrator be expanded and strengthened by giving it the authority and power substantially as recommended by the Temporary State Commission. Specifically, our Committee recommends that section 9a of the New York City Charter which created the present office of city administrator be repealed, and that a new chapter be added to the Charter, creating the proposed new office of city administrator. The form of such proposed legislation is set forth, in a form suitable for enactment, at pages 29–38 of the Second and Final Report of the Temporary State Commission. The following agencies of the City would be made subject to the direct supervision of the city administrator: Bureau of the Budget, Department of Personnel, Department of Finance, Police Department, Fire Department, Department of Parks, Department of Health, Department of Hospitals, Department of Welfare, Department of Correction, Department of Housing and Buildings, Department of Public Works, Department of Marine and Aviation, Department of Water Supply, Gas and Electricity, Department of Sanitation, Department of Licenses, Department of Purchase, Department of Markets, City Record, Department of Traffic and Department of Air Pollution Control.

Enactment of the new chapter may be accomplished by local law enacted by the Council, approved by the Board of Estimate and the Mayor, and then submitted for the approval of the electors (mandatory referendum) at the next general election held not less than sixty days after the adoption of the local law. Sections 39, 40 and 44 of the Charter so provide.

The new chapter could be enacted in two other ways, less expeditious: (a) By initiative and referendum, on petition of not less than 50,000 qualified electors for submission to the electors of the city at the next general election. Charter section 44 so provides. (b) Under the State Constitution, the Mayor may request, with the concurrence of the local legislative body, that the state legislature enact the desired charter amendments. Two-thirds of the local legislative body may also make such a request upon the declaration and finding of the existence of necessity. Concurrent action of two-thirds of the members of each house of the state legislature is needed. Constitution, Art. IX, §11. See also, City Home Rule Law, §23.

Our Committee recommends that the Association adopt this report as an expression of its opinion.

ARTHUR H. GOLDBERG, *Chairman*

DANA C. BACKUS	RICHARD J. POWERS
BORIS S. BERKOVITCH	OREN ROOT
PAXTON BLAIR	ARTHUR A. SEGALL
GERALD E. DWYER	GRENVILLE S. SEWALL
THOMAS B. FENLON	H. FRANCIS SHATTUCK, JR.
EDMOND M. HANRAHAN	DENIS R. SHEIL
LOUIS LOWENSTEIN	JOHN NELSON STEELE
JOSEPH D. McGOLDRICK	HERMAN T. STICHMAN
WILLIAM MERTENS	ALVIN McKINLEY SYLVESTER
LEWIS ORGEL	MAXWELL H. TRETTER
CASIMIR J. F. PATRICK	CYRUS R. VANCE

SYDNEY A. WOODD-CAHUSAC

COMMITTEE ON INTERNATIONAL LAW

Supplementary Report on the Constitutionality of American Participation in the Proposed Organization for Trade Cooperation (OTC) and in the General Agreement on Tariffs and Trade (GATT)

STATEMENT OF FACTS

In the spring of 1956 The Association of the Bar of the City of New York approved and issued a report of its Committee on International Law entitled "The Constitutionality of American Participation in the Proposed Organization for Trade Cooperation (OTC) and in the General Agreement on Tariffs and Trade (GATT)." The report concluded that (1) the President had the necessary authority to agree to United States adherence to and participation in GATT under the authority delegated to him in the Trade Agreements Acts and (2) there was "no Constitutional impediment to Congressional enactment of H.R. 5550," a Bill authorizing United States participation in OTC. A representative of the Association presented these conclusions at hearings on H.R. 5550 before the Ways and Means Committee of the House of Representatives. The Ways and Means Committee issued a report recommending passage of H.R. 5550, but no further action on the Bill was taken in the 84th Congress.

In the first session of the 85th Congress another Bill, H.R. 6630, was introduced with Administration sponsorship authorizing American participation in OTC. President Eisenhower urged passage of the legislation in a message sent to Congress on April 3, 1957. He said:

> "The advantages to the United States of membership in the Organization for Trade Cooperation are compelling. It would open the way to major benefits for Amercian trade by providing day to day review and consultation on administration of our trade agreements. It would provide machinery for closer supervision and protection of the assurances contained in those agreements against discriminatory treatment of American exports, and thus increase the benefits we receive from those agreements. It would enable us more effectively to encourage the opening of new opportunities for our exports to compete in the world market on their commercial merit.
>
> . . . .
>
> "The recent development of proposals for a common market and free trade area place Western Europe on the threshold of a great new movement toward economic integration. The OTC will help to assure that this movement will develop in ways beneficial to our trade and

that of other free countries, avoiding the danger that a regional trade arrangement will lead to new barriers and discriminations against our exports."

Since legislation on OTC is once more before the Congress, and since H.R. 6630 differs in some respects from H.R. 5550, the Committee on International Law considers it desirable to issue this Supplementary Report.

ARGUMENT

The Committee on International Law hereby affirms its original Report on this subject issued last year. In reaching a conclusion on the constitutionality of H.R. 6630, it wishes also to emphasize the following points, some of which were contained in its original Report, and some of which are directed specifically at the new legislation:

1. The Trade Agreements Act authorizes the President to enter into foreign trade agreements and to proclaim modifications in American tariffs and other import restrictions in accordance with those agreements. There are ample precedents for such a delegation by Congress of the powers given it under the Constitution. The Congress itself has confirmed this position by renewing the Act on ten occasions.

2. The General Agreement on Tariffs and Trade (GATT) is a multilateral trade agreement which was negotiated in 1947. It consists of (1) tariff concessions granted by the participating countries to one another, (2) a set of general trade rules, and (3) certain administrative provisions. American participation in GATT was effected by the President by a valid exercise of the powers granted him in the Trade Agreements Act.

3. The general trade rules contained in GATT are virtually identical to the rules contained in the bilateral agreements concluded by the President pursuant to the Trade Agreements Act in the years before the negotiation of GATT. The validity of American adherence to these rules is in no way affected by the fact that they are now concluded in a multilateral rather than a bilateral agreement.

4. GATT also contains administrative provisions, some of which authorize the Contracting Parties to interpret the agreement and to grant releases or waivers of its obligations to individual Contracting Parties. These powers of interpretation, release, and waiver, will henceforth be exercised by the Organization for Trade Cooperation, should the United States and a sufficient number of other contracting parties to GATT ratify the OTC Agreement.

5. The power of the Contracting Parties of GATT or of the members of OTC to interpret the obligations of the United States and other countries under GATT impinges upon no power of Congress. It is no different in principle from similar powers of interpretation provided for in international agreements to which the United States has been a party going back to the Jay Treaty of 1794. There is no power in GATT or OTC to alter a U. S. tariff rate or any other item of U. S. legislation without the consent of the United States, and it would be the sole responsibility of the United States Govern-

ment to take the necessary action to comply with the interpretation. The only sanction provided in GATT and OTC for non-compliance with an interpretation of an international obligation is authorization to other countries affected by the refusal to withdraw some of the concessions from the non-complying country.

6. The powers of release and waiver in GATT and OTC make it possible for the Contracting Parties to GATT to disobey the GATT rules in certain circumstances without incurring a retaliatory action from other parties. These powers, like the power of interpretation, are no different in principle from similar powers included in numerous international agreements to which the United States is now a party, such as the International Monetary Fund Agreement, the International Wheat Agreement, and the Convention on International Civil Aviation. They involve no power of the American Congress. When releases and waivers are granted to the United States, this country has more rather than less freedom than it would otherwise have. When they are granted to other countries, those countries may raise barriers to American trade, but they would be entitled to do this in the absence of any trade agreement at all. Such an exercise of their sovereign rights obviously impinges upon no power of the American Congress.

7. Since the administrative powers of GATT and OTC are not powers of the American Congress, nor, indeed, legislative powers at all, it is incorrect and misleading to speak of an "unconstitutional delegation" of Congressional powers to these institutions. Participation in GATT and OTC involves no delegation of Congressional powers at all.

8. The primary function of OTC is to administer GATT. In addition to exercising the administrative functions described above, OTC would also be empowered to sponsor international trade negotiations and to serve as an intergovernmental forum for the discussion and study of other questions relating to international trade. The OTC Agreement specifically provides that the Organization cannot impose on a member any new obligation which that member has not specifically agreed to undertake. Moreover, it is provided in GATT that no amendment of GATT may be made effective with respect to any member without the specific consent of that member. These provsions ensure that the obligations of the United States cannot be increased without its consent. They eliminate any possibility that participation in GATT or OTC could lead at some future time to the transfer of Congressional powers to an international agency without further action by Congress.

9. H.R. 6630 states that Congress in approving the Bill would not be committing the United States to enact any specific legislation regarding any matter referred to either in the OTC or GATT and further provides that neither the President nor any other agency or person shall accept on behalf of the United States any amendment to the OTC Agreement unless Congress by law authorizes such action. Finally, the Bill states that it does not enlarge or otherwise alter the authority granted to the President in the Trade Agreements Act and does not repeal or modify any other existing legislation. These provisions of H.R. 6630, while not essential to the main conclusions

of this Report, serve to confirm those conclusions and should remove any remaining doubts about the constitutionality of the proposed legislation.

10. The conclusions of this Report apply equally to H.R. 6631, a Bill identical to H.R. 6630, and to any other identical or substantially similar bills which may be introduced for the purpose of authorizing American participation in OTC.

CONCLUSION

The Committee on International Law, without expressing any opinion on the merits of the General Agreement on Tariffs and Trade (GATT) or the Organization for Trade Cooperation (OTC), concludes:

1. The Trade Agreements Act, which authorizes the President to enter into foreign trade agreements and to proclaim modifications of United States tariffs and other import restrictions in accordance with those agreements, is a constitutional delegation of Congressional power.

2. The Trade Agreements Act contains authority for United States participation in the General Agreement on Tariffs and Trade (GATT).

3. There is no valid Constitutional objection to Congressional enactment of H.R. 6630 authorizing United States participation in the Organization for Trade Cooperation (OTC) or any substantially similar bill designed to achieve the same purpose.

Respectfully submitted,

COMMITTEE ON INTERNATIONAL LAW

JOHN V. DUNCAN, *Chairman*	CYRIL C. MEANS, JR.
EDMUND BURKE, JR.	SEYMOUR B. QUEL
THOROLD J. DEYRUP	STEPHEN M. SCHWEBEL
FRANCIS X. DOWNEY	HAYDEN N. SMITH
RICHARD N. GARDNER	JOHN R. STEVENSON
ERNEST A. GROSS	LYMAN M. TONDEL, JR.
ETHAN ALLEN HITCHCOCK	EDWARD EVERETT WATTS, JR.

May 31, 1957

The Library

SELECTED MATERIAL ON PRESIDENTIAL INABILITY

Administration asks constitutional rules for replacing a disabled president. Bus. W. Apr. 6, 1957. 151.

Butler, Benjamin. Presidential inability. 1881. 133 N. Am. R. 428.

Cooley, Thomas M. Presidential inability. 1881. 133 N. Am. R. 422.

Corwin, Edward S. The President: Office and Powers. New York, New York Univ. Press, 1941.

Curtis, George T. Presidential inability. 1881. 25 Harpers Weekly. 583.

Disability of the president. 1919. 23 Law Notes. 141.

Dwight, Theodore W. Presidential inability. 1881. 133 N. Am. R. 436.

For emergency use only: substitute president. Apr. 19, 1957. 70 Scholastic. 14–16.

Frelinghysen, Peter, Jr. Presidential disability. Sept. 1956. 307 Annals of the Am. Acad. of Pol. and Soc. Sc. 144–155.

Fulton, J. Alexander. Presidential inability. 1881. 24 Albany L.J. 286–289.

Gilliam, Armistead W. and Sloat, Jonathan W. Presidential inability. 1956. 24 Geo. Wash. Univ. L.R. 448–464.

Green, Theodore F. Presidential succession. 1957. 61 Dick. L.R. 323–334.

Johnson, G. W. Presidential disability. Apr. 29, 1957. New Republic.

Koonce, David. Who shall determine if a president is disabled. Jan. 1956. Democratic Dig. 57–59.

Lavery, Urban A. Presidential inability. 1922. 8 Am. B.A.J. 13–17.

Leavitt, John B. A solution of the presidential inability problem. 1922. 8 Am. B.A.J. 189–190.

New York State Bar Ass'n. Committee on Federal Constitution. Presidential Inability Report. Bull. April 1957 pp. 108–10.

Parsons, W. Who succeeds a disabled president. Apr. 6, 1957. America.

Presidential inability. 1920. 2 Weekly R. 481.

Presidential disability. Apr. 19, 1957. Commonweal. 53.

The President's Illness. 1920. 14 Am. Pol. Sc. R. 87–88.

Rogers, Lindsay. Presidential inability. 2 Review. 481.

Silva, Ruth C. Presidential succession and disability. 1956. 21 Law & Contemp. Prob. 646.

Silva, Ruth C. Presidential succession. Ann Arbor, Univ. of Mich. Press, 1951.

Smith, B. If a president collapses. Mar. 23, 1957. 229 Sat. Eve. Post. 20–21.

Truman, Harry S. Presidential disability.—June 30, 1957. N. Y. Times. 1.

Trumbull, Lyman. Presidential inability. 1881. 133 N. Am. R. 417.

U. S. Congress House. Committee on the Judiciary. 66.2. Hearings on presidential inability. Washington, U. S. Govt. Print. Off., 1956.

U. S. Congress. House. Committee on the Judiciary. 84.2. Presidential inability. Washington, U. S. Govt., Print. Off., 1956. 74p.

U. S. Congress. House. Committee on the Judiciary. 84.2. Hearings on presidential inability. Washington, U. S. Govt. Print. Off., 1956.

U. S. Congress. House. Committee on the Judiciary. 84.2. Presidential inability. Replies to a questionnaire. Washington, U. S. Govt. Print. Off., 1956.

U. S. Congress. House. Committee on the Judiciary. 85.1. Presidential inability; analysis of replies to questionnaire and testimony at hearing. Washington, U. S. Govt. Print. Off., 1957. 868p.

Waugh, Edgar W. Second Consul. New York, Bobbs-Merrill, 1956.

When presidents become ill there's no clear line of authority. Oct. 1955. U. S. News. 60–63.

Who gets the power when a president is disabled. Jan. 1956. U. S. News. 42–51.

Williams, Irving G. The rise of the vice presidency. Washington, Public Affairs Press, 1956.

Wilmerding, Lucius, Jr. Presidential inability. 1957. 72 Pol. Sc. Q. 161–181.

Wyman, Louis C. When a president is too ill to handle the job. Mar. 1 1956. U. S. News. 44–45.

"My Clients Get Investment Facts and Advice from GUARANTY"

This attorney is one of many whose clients maintain Investment Service Accounts at Guaranty. Attorneys know, because of the confidence clients place in them, it is vital that they recommend only those organizations which can furnish investment advice based on knowledge and judgment.

The continuing research and supervisory facilities of Guaranty's Investment Department, together with our recommendations with respect to purchases and sales, are available through our Investment Service. The attorney knows that his client will benefit from the independent and painstaking research of our Statistical Division, which analyzes a company in regard to such factors as:

- Changes in financial situation.
- Earnings over the years.
- Probable future impact on earnings of taxes or other factors.
- Relative standing in the industry as a whole.
- Growth potential.
- Market action in good times and bad.
- Present and estimated future consumer demand.
- Most important, the resourcefulness and ability of management.

An Investment Service Account can be opened under a simple form of agreement which can be terminated at any time. The security owner retains ownership and control, and may direct holding or purchasing securities of his choice.

If you would like to know more about the advantages of this service—for your clients or for your own personal investment program—one of our Personal Trust Department officers will be happy to talk with you.

GUARANTY

TRUST COMPANY OF NEW YORK

Capital Funds in excess of $400,000,000

140 BROADWAY, NEW YORK 15

Fifth Ave. at 44th St., New York 36

Madison Ave. at 60th St., New York 21

40 Rockefeller Plaza, New York 20